(17)

No. 91-1326-CFX
Status: GRANTED

Title: The District of Columbia and Sharon Pratt Kelly, Mayor, Petitioners
v.
The Greater Washington Board of Trade

Docketed:
February 14, 1992

Court: United States Court of Appeals for the District of Columbia Circuit

Counsel for petitioner: Murasky,Donna M.

Counsel for respondent: Postol,Lawrence P.

Entry	Date	Note	Proceedings and Orders
1	Feb 14 1992	G	Petition for writ of certiorari filed.
2	Mar 18 1992		DISTRIBUTED. April 3, 1992
3	Mar 18 1992	X	Brief of respondent Greater Washington Board of Trade in opposition filed.
4	Mar 18 1992	G	Motion of Connecticut Business and Industry Association for leave to file a brief as amicus curiae filed.
5	Mar 27 1992	X	Reply brief of petitioners District of Columbia, et al. filed.
6	Apr 6 1992		Motion of Connecticut Business and Industry Association for leave to file a brief as amicus curiae GRANTED.
7	Apr 6 1992		Petition GRANTED.
			**********
8	Apr 14 1992	G	Motion of petitioners to dispense with printing the joint appendix filed.
9	Apr 27 1992		Motion of petitioners to dispense with printing the joint appendix GRANTED.
11	Apr 28 1992		Order extending time to file brief of petitioner on the merits until June 5, 1992.
12	May 8 1992		Brief amicus curiae of American Optometric Association filed.
13	Jun 4 1992		Brief amici curiae of Connecticut and Massachusetts filed.
14	Jun 5 1992		Brief amicus curiae of Association of Retired Persons filed.
15	Jun 5 1992		Brief of petitioners District of Columbia, et al. filed.
16	Jun 5 1992		Brief amicus curiae of Oklahoma filed.
17	Jun 5 1992		Brief amicus curiae of AFL-CIO filed.
18	Jul 1 1992		Brief amicus curiae of Connecticut Business and Industry Association filed.
19	Jul 1 1992		Record filed.
		*	Original proceedings and briefs U. S. Court of Appeals, District of Columbia Circuit.
23	Jul 6 1992		Brief of respondent Greater Washington Board of Trade filed.
20	Jul 8 1992		Brief of Chamber of Commerce of the United States filed.
21	Jul 8 1992		Brief amici curiae of District of Columbia Insurance Federation, et al. filed.
22	Jul 8 1992		Brief amicus curiae of United States filed.
24	Jul 16 1992		Record filed.
		*	Original proceedings U. S. District Court for the District of Columbia (1 folder)
25	Aug 10 1992	X	Reply brief of petitioners filed.
26	Aug 11 1992		CIRCULATED.
27	Aug 21 1992		SET FOR ARGUMENT TUESDAY, NOVEMBER 3, 1992. (1ST CASE).

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No. 91-1326-CFX

Entry	Date	Note	Proceedings and Orders
28	Nov 3 1992		ARGUED.

91-1826

No. 91-

In The

Supreme Court of the United States

OCTOBER TERM, 1991

THE DISTRICT OF COLUMBIA
AND SHARON PRATT KELLY, MAYOR,
Petitioners,

v.

THE GREATER WASHINGTON BOARD OF TRADE,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

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STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

In *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983), this Court ruled that the federal Employee Retirement Income Security Act ("ERISA") does not preempt state disability insurance laws protecting employees insofar as these laws permit employers to comply with them by establishing an employee benefit plan that is separate from their ERISA-covered employee benefit plans. The issue presented for review concerns that central holding of *Shaw*: whether *Shaw* sanctions ERISA preemption of a state workers' compensation law which requires employers, who provide health insurance to their employees, to provide equivalent benefits to employees injured on the job when (1) ERISA treats workers' compensation laws just like disability insurance laws and (2) the workers' compensation law at issue permits employers to comply with it by establishing an employee benefit plan separate from their ERISA-covered employee benefit plans.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

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THE GREATER WASHINGTON BOARD OF TRADE
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

The District of Columbia and Sharon Pratt Kelly, its Mayor, petition this Court for a writ of certiorari to review a decision of the United States Court of Appeals for the District of Columbia Circuit.[1]

OPINIONS BELOW

The November 15, 1991, decision of the United States Court of Appeals for the District of Columbia Circuit is reported at 948 F.2d 1317. App. 1a-20a. The March 27, 1991, decision of United States District Court for the District of Columbia in Civil Action No. 91-00511 is not reported. App. 21a-29a.

The court of appeals had jurisdiction pursuant to 28 U.S.C. § 1291. Following its decision, petitioners filed a timely petition for rehearing. That petition was denied on January 10, 1992. App. 31a.

[1] At the time of the decision below, the Mayor's name was Sharon Pratt Dixon; since that time, she has married and has changed her name to Sharon Pratt Kelly.

JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The case involves both the Employee Retirement Income Security Act of 1974 ("ERISA"), 88 Stat. 829, as amended, 29 U.S.C. § 1001 *et seq.* and the District of Columbia Workers' Compensation Equity Amendment Act of 1990 ("Equity Amendment Act"), D.C. Law 8-198, codified in scattered sections of D.C. Code Ann. §§ 36-301 to -342.1 (1991 supp.). The relevant text of these provisions is reproduced in the appendix. App. 32a-34a.

STATEMENT OF THE CASE

I. THE DISTRICT OF COLUMBIA'S WORKERS' COMPENSATION LAW.

The District of Columbia's workers' compensation law requires employers in the District to compensate their employees who suffer work-related injury or death for loss of income and for disability; and it also requires employers to provide medical services and supplies for any such injury. See D.C. Code Ann. § 36-301 *et seq.* (1981 ed. 1988 repl. 1991 supp.). This law is the exclusive remedy available to employees against their employers for work-related injury or death. D.C. Code Ann. § 36-304.

In 1990, the Council of the District of Columbia amended its workers' compensation law by enacting the District of Columbia Workers' Compensation Equity Amendment Act of 1990, D.C. Act 8-261. Following approval by the Mayor on October 24, 1990, and the expiration of the Congressional review period, the Equity Amendent Act became effective on March 6, 1991. D.C. Law 8-198.

The Equity Amendment Act requires employers, who provide health insurance to their employees, to provide equivalent health insurance, for up to 52 weeks, to employees

who are receiving, or who are eligible to receive, workers' compensation under the District's workers' compensation law. D.C. Code Ann. § 36-307(a-1) (1991 supp.) states:

> (1) Any employer who provides health insurance coverage for an employee shall provide health insurance coverage equivalent to the existing health insurance coverage of the employee while the employee receives or is eligible to receive workers' compensation benefits under this chapter. . . .
>
> (3) The provision of health insurance coverage shall not exceed 52 weeks and shall be at the same benefit level that the employee had at the time the employee received or was eligible to receive workers' compensation benefits.

II. ERISA.

ERISA is a complex, comprehensive federal statute designed to ensure that employees are not unfairly deprived of pension and other employment-related benefits promised by their employers. To achieve this goal, ERISA imposes a number of obligations on employers and, in exchange, preempts, with important exceptions, state legislation relating to employee benefit plans.[2] For example, ERISA reserves to the states the power to enact legislation governing subjects traditionally within their purview, such as legislation providing benefits to employees pursuant to workers' compensation, unemployment compensation, and disability insurance laws, as well as legislation governing insurance, banking, and securities.

ERISA's central provisions require employer-sponsored employee welfare benefit plans — plans providing for medical and similar benefits or for "benefits in the event of sickness, accident, disability, death or unemployment" — to comply with federal standards governing reporting, disclosure, and

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[2] Section 3(10) of ERISA, 29 U.S.C § 1002(10), defines the term, "State," as including the District of Columbia.

fiduciary responsibility.[3] 29 U.S.C. §§ 1021-1031, 1101-1114. ERISA also requires employer-sponsored pension benefit plans to comply with those standards; in addition, such pension plans must comply with federal standards regulating participation, vesting, and funding (29 U.S.C. §§ 1051-1086). ERISA does not mandate substantive benefit terms or levels, but simply provides procedural protections for voluntary employee benefit plans.

To ensure comprehensive federal regulation of employee benefit plans, ERISA preempts state laws "relating to" such plans, subject to a number of important exceptions. Section 514(a) of ERISA, 29 U.S.C. § 1144(a), states, in pertinent part, that ERISA

> shall supersede any and all State laws insofar as they may now or hereafter *relate to any employee benefit plan described in section 1003(a)* [§ 4(a)] of this title and *not exempt under section 1003(b)* [§ 4(b)] of this title.

(Emphasis added). Section 4(a), 29 U.S.C. § 1003(a), defining "Coverage," states in pertinent part: *Except as provided in subsection (b) of this section* . . ., this subchapter shall apply to any employee benefit plan if it is established or maintained -- (1) by any employer engaged in commerce or in any industry or activity affecting commerce . . .." (Emphasis added).

The exemptions from preemption of greatest importance to this case are two. First, ERISA expressly contemplates the continued existence of state workers' compensation, unemployment compensation, and disability insurance laws.

[3] Section 3(1) of ERISA, 29 U.S.C. § 1002(1), defines an employee welfare benefit plan as including "any plan, fund, or program . . . established or maintained by an employer . . . for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment . . .."

Employee benefit plans maintained solely for the purpose of complying with such laws are exempt from ERISA's disclosure, reporting, and fiduciary requirements and are subject to state regulation. Thus, section 4(b)(3) of ERISA, 29 U.S.C. § 1003(b)(3), provides:

> (b) The provisions of this subchapter shall not apply to any employee benefit plan if --
>
> (3) *such plan is maintained solely for the purpose of complying with applicable workmen's compensation laws or unemployment compensation or disability insurance laws* . . . .[4]

Second, ERISA contains an exemption from preemption for state laws regulating insurance, banking, and securities. Section 514(a), 29 U.S.C. § 1144(a), states that ERISA supersedes state laws relating to employee benefit plans "[e]xcept as provided in subsection (b) of this section." Subsection 514(b), one of the "savings" provisions of the ERISA preemption clause, provides in paragraph (2)(A): "Except as provided in subparagraph (B), nothing in this subchapter shall be construed to exempt or relieve any person from any law of any State which regulates insurance, banking, or securities." 29 U.S.C. § 1144(b)(2)(A). Subparagraph (B), 29 U.S.C. § 1144(b)(2)(B), the "deemer" provision, prohibits states from, *inter alia*, characterizing employee benefit plans as insurance and thus as subject to state regulation.

III. THE PROCEEDINGS BELOW.

The District Court.

Almost immediately after the District's Equity Amendment Act became effective, the Greater Washington Board of Trade, a not-for-profit corporation that provides health insurance to its employees, brought an action in the United

[4] (Emphasis added). Subsection 4(b), 29 U.S.C. § 1003(b), also renders ERISA not applicable to employee benefit plans that are government plans ((b)(1)); church plans ((b)(2)); plans maintained outside the United States for nonresident aliens ((b)(4)); and unfunded excess benefit plans ((b)(5)).

States District Court for the District of Columbia pursuant to 28 U.S.C. § 1331. The Board of Trade sought a declaration that the Equity Amendment Act is preempted by ERISA and an injunction against its enforcement; the District responded by moving to dismiss the complaint for failure to state a claim.

The Honorable Louis F. Oberdorfer ruled that ERISA did not preempt the District's amendment of its workers' compensation law. In so ruling, Judge Oberdorfer relied principally upon two cases: (1) *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983), in which this Court held that a state disability benefits law, requiring employers to provide monetary benefits to women disabled from working because of pregnancy, was not preempted by ERISA; and (2) *R.R. Donnelley & Sons Co. v. Prevost*, 915 F.2d 787 (2d Cir. 1990), *cert. denied*, 111 S. Ct. 1415 (1991), in which the Second Circuit, interpreting *Shaw*, ruled not preempted a state workers' compensation statute on which the District's Equity Amendment Act was modeled. App. 22a-26a. In Judge Oberdorfer's view, the Equity Amendment Act, like the disability benefits law in *Shaw*, and the workers' compensation law in *Donnelley*, "related to" employee welfare benefit plans covered by ERISA. App. 22a-23a & 25a. However, the Equity Amendment Act was not totally preempted for that reason, because that Act, like the statutes in *Shaw* and *Donnelley*, permits employers to comply by establishing an employee benefit plan, separate from their ERISA-covered plans, solely for the purpose of complying with a state statute protected by section 4(b)(3) of ERISA, 29 U.S.C. § 1003(b)(3). App. 25a-26a. As a consequence, Judge Oberdorfer denied the Board of Trade's motion for declaratory and injunctive relief and granted the District's motion to dismiss. App. 30a.

The Court of Appeals.

The United States Court of Appeals for the District of Columbia Circuit reversed. App. 1a. According to the court of appeals, if a state law "relates to" an ERISA-covered plan,

it can be saved from preemption only if it is a law, such as a law governing insurance, saved by section 514(b) of ERISA, 29 U.S.C. § 1144(b). App. 10a, 13a. Here, the Equity Amendment Act relates to ERISA-covered plans by tying the Act's coverage and benefit levels to those established by employers' ERISA-covered plans; and the Equity Amendment Act is not a law encompassed by the savings clause of section 514(b). App. 11a-13a. The Equity Amendment Act is therefore preempted even though employers can comply with the Act by establishing and maintaining a plan separate from their ERISA-covered plans. App. 15a. In so ruling, the court acknowledged that *Shaw* "found that where the [state] law gives employers the option of establishing a separate benefit plan that is exempt from ERISA coverage under section 4(b), such a law would not be preempted." App. 11a-12a. The court ruled, however, that *Shaw* was distinguishable because, in its view, "the state law in *Shaw* related only to an employee disability insurance plan" exempt from ERISA, and not "to an ERISA-*covered* plan." App. 12a (emphasis supplied by court). Thus, "[t]he plan to which the . . . Disability Benefits Law related *was* exempt, so the law did not even qualify at the threshold for preemption." App. 12a-13a (emphasis supplied by court). According to the court, "[h]ad the Equity Amendment Act related only to the workers' compensation plan — had it, for example, made no reference to existing ERISA-covered plans and simply required all employers to provide specified minimum health benefits for employees receiving workers' compensation — it would clearly have survived preemption under the principles announced in *Shaw*." App. 12a.

In its opinion, the court of appeals expressly declined to follow the Second Circuit's decision in *Donnelley* even though it recognized that "[t]he statute at issue in *Donnelley* is indistinguishable from the Equity Amendment Act" and that the Second Circuit in *Donnelley* had ruled, based on *Shaw*, that the state statute, on which the District had modeled its Equity Amendment Act, was not preempted by ERISA. App. 15a.

Finally, the court of appeals examined the policy and purpose of ERISA. Thus, Congress, in enacting ERISA, was concerned that " '[a] patchwork scheme of regulation would introduce considerable inefficiencies in benefit program operation, which might lead those employers with existing plans to reduce benefits, and those without such plans to refrain from adopting them.' " App. 16a, quoting *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 11 (1987). By way of illustration, and in express contradiction of its earlier ruling that the law in *Shaw* had not related to ERISA-covered plans, the court of appeals explained that Congress'

> concern for minimizing the burden on the administration of ERISA-covered plans is reflected in the decision of the [Supreme] Court in *Shaw*, where it held that *the Disability Benefits Law was preempted to the extent that it applied to benefits provided under a multibenefit plan*: "An employer with employees in several States would find its plan subject to a different jurisdictional pattern of regulation in each State, depending on what benefits the State mandated under disability, work[ers'] compensation, and unemployment compensation laws."

App. 16a (emphasis added), quoting *Shaw*, *supra*, 463 U.S. at 107. In the case of the Equity Amendment Act, the court of appeals determined that it "could have a serious impact on the administration and content of the ERISA-covered plan." App. 17a. The court failed to identify, however, what potential burden the Equity Amendment Act places on the administration of ERISA-covered plans and held that preemption would be required even if there were no such impact because the Act could have an impact on employer decisions whether to provide health insurance benefits to employees and the level of such benefits. App. 18a, citing *Standard Oil Co. v. Agsalud*, 633 F.2d 760 (9th Cir. 1980), *aff'd mem.*, 454 U.S. 801 (1981). This potential impact, according to the court, meant that the District was impermissibly attempting "to regulate indirectly" what it was "forbidden to regulate directly"— the provision of health insurance benefits to employees pursuant to plans covered by ERISA. App. 18a.

REASONS FOR GRANTING THE WRIT

This case raises important issues about the extent to which ERISA restricts the power of the States and the District of Columbia to require employers to provide benefits to employees, including health insurance, as part of workers' compensation, unemployment compensation, and disability insurance laws. The court below has held that ERISA precludes states from requiring health insurance, as part of workers' compensation for employees who suffer on-the-job injuries, whenever these benefits are set by reference to what employers otherwise provide their employees. It has done so even though workers' compensation laws typically set benefits by reference to such employer decisions.

The decision below conflicts with this Court's decision in *Shaw*, which found that ERISA permits states to enact disability insurance and similar laws requiring employers to provide benefits to employees so long as employers are given the option of complying with such state laws by establishing a plan separate from their ERISA-covered plans. The decision also conflicts with the Second Circuit's decision in *Donnelley*, which found that ERISA permits states to enact workers' compensation laws like the District's Equity Amendment Act. Review by this Court is necessary to resolve these conflicts in order to ensure a consistent interpretation of an important federal statute in a manner that properly preserves the power of the States and the District to enact legislation in areas of traditional local concern and on the important matter of employer-provided health insurance benefits. Review is particularly necessary now because, only last year, this Court declined to review *Donnelley*. The States and the District of Columbia thus need to have their powers clarified; and state and federal courts need guidance in determining the extent to which ERISA preempts local laws — workers' compensation, unemployment compensation, and disability insurance laws — that ERISA expressly preserves.

I. THE DECISION BELOW IS IN CONFLICT WITH THIS COURT'S DECISION IN *SHAW*.

In *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983), this Court unanimously ruled that ERISA does not preempt state legislation requiring employers to provide disability benefits to employees to the extent that such legislation permits employers to comply by establishing employee benefit plans administratively separate from their ERISA-covered plans. At issue in *Shaw* was a state law requiring employers to pay monetary benefits for up to 26 weeks in any one-year period to employees unable to work because of pregnancy or other non-occupational disability. The disability benefits law was challenged by employers who had employee benefit plans subject to ERISA which did not include all the benefits mandated by the state law.

In *Shaw*, this Court took a two-step approach in determining whether the state law was preempted by ERISA: "The issues are whether the [state laws] . . . 'relate to' employee benefit plans within the meaning of § 514(a), . . . and, if so, whether any exception in ERISA saves them from preemption." *Id.* at 96.[5] According to this Court, "[a] law 'relates to' an employee benefit plan, in the normal sense of the phrase, if it has a connection with or reference to such a plan." *Id.* at 96-97.

This Court ruled that "the Disability Benefits Law plainly is a state law relating to employee benefit plans," and that, as a consequence, whether the law was preempted depended on whether "the plans to which it relates are exempt from

[5] *Shaw* also involved the validity of a state human rights law prohibiting employment discrimination, including discrimination in employee benefit plans, on the basis of pregnancy. This Court ruled that this law was preempted insofar as it prohibited practices by ERISA-covered benefit plans that were lawful under federal law; this Court also ruled, pursuant to section 514(d) of ERISA, 29 U.S.C. § 1144(d)(4), a provision which saves other federal laws from preemption, that the state human rights law was not preempted to the extent that it prohibited practices that were also prohibited by federal law.

ERISA under § 4(b)." *Id.* at 106. More specifically, because the state law at issue was an employment-related disability insurance law, preemption turned on the meaning of section 4(b)(3) of ERISA, which exempts from ERISA coverage employee benefit plans " 'maintained solely for the purpose of complying with applicable [workmen's compensation laws or unemployment compensation or] disability insurance laws.' " *Id.*, quoting 29 U.S.C. § 1003(b)(3).

This Court identified two problems in resolving this issue. First, some of the employers affected by the state law had multibenefit plans governed by ERISA that provided benefits not required by the state law; this was problematic because the plans exempted from ERISA under section 4(b)(3) encompass only plans "maintained solely" to comply with the designated state laws. *Id.* at 106-07. "The test" for determining this matter, this Court ruled, is "whether the plan, as an administrative unit, provides only those benefits required by the applicable state law." *Id.* at 107. Thus, because there cannot be mutually exclusive pockets of federal and state jurisdiction within a plan, "[o]nly separately administered disability plans maintained solely to comply with the Disability Benefits Law are exempt from ERISA coverage under § 4(b)(3)." *Id.* at 108.

The second problem confronting this Court in *Shaw* was to prevent employers from evading lawful state regulation of employee welfare benefits pursuant to workers' compensation, unemployment compensation, and disability insurance laws by the expedient of adopting multibenefit plans subject to ERISA that combine benefits inferior to those required by state law with other benefits. To keep from making enforcement of these state laws "impossible," a result "Congress surely did not intend," this Court held in *Shaw* that such laws are not preempted by ERISA so long as they give employers the option of complying with them by establishing plans that are administratively separate from

their ERISA-covered plans. *Id.* at 108. In a key passage, this Court articulated the central principle governing ERISA preemption of state workers' compensation, unemployment compensation, and disability insurance laws as follows:

> A State may require an employer to maintain a disability plan complying with state law as a separate administrative unit. Such a plan would be exempt under § 4(b)(3). The fact that state law permits employers to meet their state-law obligations by including disability insurance benefits in a multibenefit ERISA plan . . . does not make the state law wholly unenforceable as to employers who choose that option.
>
> In other words, *while the State may not require an employer to alter its ERISA plan, it may force the employer to choose between providing disability benefits in a separately administered plan and including the state-mandated benefits in its ERISA plan.* If the State is not satisfied that the ERISA plan comports with the requirements of its disability insurance law, it may compel the employer to maintain a separate plan that does comply.

Id. at 108 (emphasis added). As applied to the case before it, this Court held that the state disability benefits law *was preempted* to the extent that it would permit enforcement by requiring employers to alter their ERISA-covered plans. This Court also held that the law *was not preempted* to the extent that it gave employers the option of establishing a separate administrative unit to comply with its terms.

Given this Court's rulings in *Shaw* that the disability benefits law was preempted in part and not preempted in part, it is apparent that *Shaw* rests on two fundamental principles. First, *Shaw* recognizes that benefits required by workers' compensation, unemployment compensation, or disability insurance laws are, *by definition*, employee welfare benefits, that is, "benefits in the event of sickness, accident, disability . . . or unemployment" within the meaning of

section 3(1) of ERISA, 29 U.S.C. § 1002(1). As a consequence, such state laws necessarily will "relate to" ERISA-covered employee welfare benefit plans. Second, to avoid preemption of all state laws governing workers' compensation, unemployment compensation, and disability — a result Congress plainly did not intend in view of ERISA's express exemption for plans maintained solely to comply with such laws — *Shaw* allows states to enact such laws so long as these laws permit employers to comply by establishing an employee benefit plan separate from their ERISA-covered plans. To rule otherwise would allow employers to evade compliance with workers' compensation, unemployment compensation, and disability insurance laws by establishing an ERISA-covered employee welfare benefit plan combining benefits not required by state law with benefits inferior to those required by state law.

The decision of the court of appeals here thus squarely conflicts with *Shaw* in a number of respects:

1. The court of appeals ignored *Shaw*'s holding that state legislation encompassed by section 4(b)(3) of ERISA is not preempted, even if it "relates to" an ERISA-covered plan, insofar as it governs plans maintained solely for the purpose of complying with such state legislation. Instead, it erroneously interpreted *Shaw* as merely ruling that the New York disability insurance law was not preempted because the law did not "relate to" ERISA-covered plans. This was an error the court of appeals acknowledged elsewhere in its opinion when it described *Shaw* as holding that "the Disability Benefits Law was preempted to the extent that it applied to benefits provided under a multibenefit plan" subject to ERISA. App. 16a. Plainly, if the New York law had not related to ERISA-covered plans, it would not have been preempted by ERISA to any extent. Thus, as this Court ruled in *Shaw*, "[t]he court of appeals erred . . . in holding that New York was not at all free to enforce the Disability Benefits Law against those" employers "that provide disability benefits as part of multibenefit plans." *Shaw*,

supra, 463 U.S. at 108. Here, too, the court of appeals erred in holding that the District of Columbia is not at all free to enforce its Equity Amendment Act against those employers that provide health insurance as part of ERISA-covered multibenefit plans.

2. The court of appeals erroneously ruled that, because ERISA does not list workers' compensation laws in its "savings" clause (§ 514(b)), along with insurance and similar laws, workers' compensation laws are preempted whenever they "relate to" ERISA-covered plans by expressly referring to such plans. The fact that the preemption provision of ERISA, section 514(a), incorporates a savings clause for state insurance and similar laws, does not negate the statutory exemption from preemption in section 514(a) for laws, such as workers' compensation and disability insurance laws, that relate to plans which are exempt from ERISA coverage by virtue of section 4(b)(3). Indeed, this Court in *Shaw* described both "[s]ections 4(b)(3) and 514(b)" as provisions "which list specific exceptions" to preemption. 463 U.S. at 104.

3. The court of appeals erred in ruling that the District's Equity Amendment Act runs afoul of ERISA because it "relates to" ERISA-covered plans by expressly referencing such plans in establishing health insurance coverage and benefit levels. ERISA itself makes no distinction based on the manner in which a workers' compensation or similar law "relates to" an ERISA-covered plan so long as the law does not require employers to alter their ERISA-covered plans. As this Court ruled in *Shaw*, the term "relates to" means having "a connection with *or* reference to such a plan." 463 U.S. at 97 (emphasis added). Furthermore, there are no policy reasons underlying ERISA that would support disparate treatment of a law, such as that in *Shaw*, which has a connection with ERISA-covered plans, and a law, such as that in *Donnelley* and in this case, which has a reference to, and thus a connection with, such plans. Under this Court's analysis in *Shaw*, the District's Equity Amendment Act is

just like New York's Disability Benefits Law: it "relates to" ERISA-covered plans, voluntary employer-sponsored employee welfare benefit plans providing various benefits, but an employer may comply with the Act by establishing a plan separate from its ERISA-covered plan.

4. The court of appeals erred in stating that the District has impermissibly "tried to regulate indirectly what" it is "forbidden to regulate directly." App. 18a. To the contrary, the Equity Amendment Act does not require employers to provide health insurance benefits to employees under their ERISA-covered plans and it does not purport to regulate the terms or the administration of such plans. Under the Equity Amendment Act, employers remain free to alter their ERISA-covered plans as they deem appropriate. All that the Act does is to require employers, who provide health insurance to their employees pursuant to their ERISA-covered plans, to provide equivalent health insurance to their employees entitled to workers' compensation. Employers may comply with this Act by establishing plans that are separate from their ERISA-covered plans, *ie.*, plans established solely for the purpose of complying with the Equity Amendment Act.[8]

[8] This Court's other decisions involving workers' compensation laws or health insurance benefits in which preemption was found are very different from the law at issue here. Thus, *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504 (1981), involved a state statute forbidding employers from integrating employee benefits payable pursuant to ERISA-covered pension plans with employee benefits payable pursuant to workers' compensation laws. That state statute not only precluded employers from establishing a plan separate from their ERISA-covered plans in order to comply with it, but also conflicted with federal law permitting integration of such benefits. *Standard Oil Co. v. Agsalud*, 633 F.2d 760 (9th Cir. 1980), *aff'd mem.*, 454 U.S. 801 (1981), involved a state law which required employers to provide their employees with a comprehensive health-care plan, and thus required employers to alter their ERISA-covered plans. In *Standard Oil*, the court of appeals also ruled that the state law was not a disability insurance law, and thus protected by section 4(b)(3) of ERISA, 29 U.S.C. § 1003(b)(3), because the state required benefits to be paid without regard to a disabling injury. 633 F.2d at 764. By [Footnote continued on next page]

5. The court of appeals erred in ruling that the Equity Amendment Act is different, for ERISA purposes, from a workers' compensation law that sets health insurance benefits for injured employees without reference to health insurance benefits provided by employers pursuant to their ERISA-covered plans. Even a statute of the latter type would have a connection with, and thus "relate to," ERISA-covered plans, whether such plans provided no health insurance benefits to injured workers, 30 days of such benefits, or even 104 weeks of such benefits. See *infra* note 7. Such a statute might also cause employers to modify benefits provided by their ERISA-covered plans and result in administrative difficulties, particularly where the benefits required by law for injured workers differ from those provided by an ERISA-covered plan. This statute would not, of course, be preempted by ERISA so long as employers could comply with it by establishing an employee benefit plan separate from their ERISA-covered plans.

II. THE DECISION BELOW CREATES A SQUARE AND INTOLERABLE CONFLICT WITH THE SECOND CIRCUIT.

The court of appeals expressly acknowledged that the District's Equity Amendment Act is "indistinguishable" from the state workers' compensation legislation that withstood an ERISA-based attack in *R.R. Donnelley & Sons Co. v. Prevost*, *supra*. App. 15a. The court of appeals also expressly acknowledged that its decision squarely conflicts with *Donnelley*:

[Footnote continued from the previous page]
contrast, the Equity Amendment Act requires health insurance to be provided only to employees who are receiving or who are eligible to receive workers' compensation, a law that does not require employers to alter their ERISA-covered plans. Finally, *Stone & Webster Eng'g Corp v. Ilsley*, 690 F.2d 323 (2d Cir. 1982), *aff'd mem. sub nom., Arcudi v. Stone & Webster Eng'g Corp.*, 463 U.S. 1220 (1983), involved a state workers' compensation law that required employers to alter their ERISA-covered multibenefit plans to provide health insurance to injured workers, a law that *Shaw* made clear is preempted by ERISA. See also *infra* at 18.

"[W]e disagree with the conclusion of the Second Circuit in *Donnelley* and conclude that the district court in this case erred in holding that the Equity Amendment Act was not preempted." App. 16a.

The court of appeals is correct that its decision cannot be reconciled with the Second Circuit's decision in *Donnelley*. In *Donnelley*, the Second Circuit ruled that ERISA does not preempt a workers' compensation law requiring employers, who provide health insurance to their employees, also to provide equivalent benefits to employees eligible to receive workers' compensation. In so ruling, the Second Circuit recognized that, under *Shaw*, the statute "related to" an ERISA-covered employee welfare benefit plan.[7] However, the statute was not preempted pursuant to *Shaw's* interpretation of the exemption from preemption for state laws governing employee benefit plans maintained solely for the purpose of complying with state workers' compensation, unemployment compensation, or disability insurance statutes. Thus, the Second Circuit found significant the "caveat" in *Shaw* that ERISA should not be construed to allow employers to circumvent such state laws by establishing ERISA-covered employee benefit plans combining benefits inferior to those required by state law with other benefits not required by state law. 915 F.2d at 793. In applying *Shaw* to the case before it, the Second Circuit observed that the state statute permitted an employer to comply with its requirements by establishing an administrative unit separate from the unit administering its ERISA plan. The fact that the statute also afforded an employer alternative avenues by which to comply with its requirements did not require the conclusion that it was preempted by ERISA. Thus, "if *Shaw* allows a state to authorize alternatives to a separate plan *within* an ERISA plan without losing the benefit of the

[7] Indeed, in *Donnelley*, the employer who challenged the state statute had provided for up to 104 weeks of health insurance in its ERISA plan for employees receiving workers' compensation. 915 F.2d at 790.

section 1003(b)(3) exemption, it may surely authorize such alternatives *outside* the confines of an ERISA plan without doing so." *Id.* at 793-94 (emphasis in original).

The Second Circuit also distinguished its earlier decision in *Stone & Webster Eng'g Corp. v. Ilsley*, 690 F.2d 323 (1982), *aff'd mem. sub nom., Arcudi v. Stone & Webster Eng'g Corp.*, 463 U.S. 1220 (1983), in which it had ruled preempted a state statute requiring employers who provide health insurance to their employees also to provide health insurance to injured workers. That earlier statute had required employers to provide such benefits by altering their ERISA-covered plans and did not give them the option, found critical in *Shaw*, of establishing a plan solely for the purpose of complying with the workers' compensation law.

Like the law held not preempted in *Donnelley*, the District's Equity Amendment Act does not require an employer to alter its ERISA-covered employee welfare benefit plan, but simply provides that an employer, otherwise subject to the District's workers' compensation law, shall provide health insurance in addition to benefits already required to be provided to employees who receive or who are eligible to receive workers' compensation. Furthermore, the Equity Amendment Act permits an employer to comply with its terms by establishing an administrative unit that is separate from its ERISA-covered plan. As the Second Circuit ruled in *Donnelley*, under *Shaw*, there is no preemption bar to this Act. Instead, the Act is well within the workers' compensation laws that Congress expressly declined to preempt in ERISA.

CONCLUSION

The decision of the court of appeals in this case, interpreting an important federal statute in a manner that restricts the powers of the States and the District of Columbia to enact workers' compensation, unemployment compensation, and disability insurance laws, is in direct conflict

with a decision of this Court and a decision of the Second Circuit. This petition should be granted to resolve these conflicts, both to ensure uniform application of ERISA and to restore to the States and the District the powers reserved to them by ERISA in the important areas of workers' compensation, unemployment compensation, and disability insurance laws.

Respectfully submitted.

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APPENDIX A

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued October 22, 1991 Decided November 15, 1991

No. 91-7061

GREATER WASHINGTON BOARD OF TRADE, APPELLANT

v.

DISTRICT OF COLUMBIA
and SHARON PRATT DIXON, APPELLEES

Appeal from the United States District Court
for the District of Columbia

(Civil Action No. 91-00511)

Lawrence P. Postol for appellant.

Donna M. Murasky, Assistant Corporation Counsel, Office of the Corporation Counsel, with whom *John Payton,* Corporation Counsel, and *Charles L. Reischel,* Deputy Corporation Counsel, were on the brief for appellees. *Martin B. White,* Counsel, Office of the Corporation Counsel, also entered an appearance for appellees.

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Before MIKVA, *Chief Judge*, WALD and BUCKLEY, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* WALD.

WALD, *Circuit Judge*: Appellant Greater Washington Board of Trade ("Board") is a nonprofit corporation that provides health insurance to its employees. The Board brought suit against appellees District of Columbia ("District") and Mayor Sharon Pratt Dixon seeking an injunction against the enforcement of a provision of the District of Columbia Workers' Compensation Equity Amendment Act of 1990 (D.C. Act 8-261) ("Equity Amendment Act" or "Act"), 37 D.C. Reg. 6890 (1990) (codified in scattered sections of D.C. CODE ANN. §§ 36-301 to -342.1 (Supp. 1991)). The Board claimed that section 2(c)(2) of the Equity Amendment Act was preempted by the Employee Retirement Income Security Act of 1974 ("ERISA"), § 514(a), 29 U.S.C. § 1144(a) (1988).[1] Appellees filed a motion to dismiss the complaint, arguing that the Act was not preempted by ERISA. On March 27, 1991, the district court granted appellees' motion to dismiss and denied the Board's motion for a preliminary injunction. *See Greater Wash. Bd. of Trade v. District of Columbia*,

[1]Appellant conceded at oral argument that it was no longer pressing the alternative argument that Congress never contemplated in 1974, when exempting workers' compensation plans from ERISA coverage, *see* 29 U.S.C. § 1003(b)(3) (1988), that such plans would include mandated health benefits. The Supreme Court found a similar argument with respect to "innovative" insurance contracts unpersuasive:

> The presumption is against pre-emption, and we are not inclined to read limitations into federal statutes in order to enlarge their preemptive scope. Further, there is no indication in the legislative history that Congress had such a distinction [between traditional and innovative insurance laws] in mind. —

Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 741 (1985). We agree that "innovative" workers' compensation plans should be treated the same as other "workers' compensation plans" within the meaning of ERISA.

No. 91-00511 (D.D.C. Mar. 27, 1991) ("Memorandum Opinion") at 2. Because we find that the plain meaning of ERISA's preemption provision as well as the policies and purposes furthered by ERISA preemption compel the conclusion that section 2(c)(2) of the Equity Amendment Act is preempted, we reverse.

I. BACKGROUND

A. *The Equity Amendment Act*

The Equity Amendment Act became effective on March 6, 1991.[2] The Act amended portions of the District's workers' compensation law, D.C. CODE ANN. §§ 36-301 to -345 (1981 & Supp. 1991), "in order to promote a fairer system of compensation, facilitate a more expeditious processing of claims, and establish a Commission to study the procedure and method of ratemaking for workers' compensation insurance," Equity Amendment Act preamble. Although the Act amended several sections of the workers' compensation law, the only relevant provision on this appeal is the following:

> (1) Any employer who provides health insurance coverage for an employee shall provide health insurance coverage equivalent to the existing health insurance coverage of the employee while the employee receives or is eligible to receive workers' compensation benefits under this act.
>
> . . . .

[2]Pursuant to the District of Columbia Self-Government and Governmental Reorganization Act, Pub. L. No. 93-198, § 602(c)(1), 87 Stat. 774, 814 (1973) (codified as amended at D.C. CODE ANN. § 1-233(c)(1) (1981)), the Council of the District of Columbia ("Council") is required to transmit an act, once it has been signed by the mayor, to Congress. The act will become law within thirty days unless Congress adopts a concurrent resolution disapproving it. The Council transmitted the Equity Amendment Act to Congress on January 11, 1991; no concurrent resolution having been passed, the Act became D.C. Law 8-198 on March 6, 1991. *See* Notice, 38 D.C. Reg. 1752 (1991).

> (3) The provision of health insurance coverage shall not exceed 52 weeks and shall be at the same benefit level that the employee had at the time the employee received or was eligible to receive workers' compensation benefits.

Equity Amendment Act § 2(c)(2) (codified at D.C. CODE ANN. § 36-307(a-1)(1), (3) (Supp. 1991)). By its terms, the Act requires employers to provide health benefits to employees eligible for workers' compensation benefits only if the employers already provide health benefits under a different plan.

The original version of the bill did not require employers to provide benefits to employees receiving workers' compensation; however, a substitute bill containing the provision for health benefits was passed by the Committee on Housing and Economic Development on July 6, 1990.[3] Section 2(c)(2) of the substitute bill read as follows:

> Any employer who provides health insurance coverage for an employee shall *maintain the health insurance coverage of the employee* while the employee receives or is eligible to receive workers' compensation benefits under this act.

D.C. Bill 8-74 (as amended), § 2(c)(2) (1990) (emphasis added).[4] The Council amended the bill once again before it was passed. The portion of the substitute bill italicized above was replaced by the language eventually included in the Act:

> Any employer who provides health insurance coverage for an employee shall *provide health insurance coverage equivalent to the existing health insurance coverage of the employee* while the employee receives

[3]For the legislative history of the Act up to the point that it was reported to the Council, *see* COMM. ON HOUS. AND ECONOMIC DEV., REPORT TO THE COUNCIL OF THE DISTRICT OF COLUMBIA ON THE "DISTRICT OF COLUMBIA WORKERS' COMPENSATION EQUITY AMENDMENT ACT OF 1990," BILL 8-74 (July 6, 1990) ("REPORT ON BILL 8-74").

[4]The substitute bill is reprinted as Attachment F in REPORT ON BILL 8-74, *id*.

> or is eligible to receive workers' compensation benefits under this act.

Equity Amendment Act § 2(c)(2) (codified at D.C. CODE ANN. § 36-307(a-1)(1) (Supp. 1991)) (emphasis added).

B. *ERISA*

ERISA was enacted in 1974 as a statutory scheme the primary purpose of which was to protect

> the interests of participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts.

ERISA § 2(b) (codified at 29 U.S.C. § 1001(b) (1988)). ERISA defines an "employee benefit plan" as either an employee *welfare* benefit plan—which generally provides for some combination of medical, health, sickness, accident, disability, death, or unemployment benefits—or an employee *pension* benefit plan—which generally provides for retirement income. *Id.* § 3(1)-(3) (codified at 29 U.S.C. § 1002(1)-(3) (1988)).

Section 514(a) of ERISA expressly provides for the preemption of state law:

> Except as provided in subsection (b) of this section, the provisions of this title and title IV shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 4(a) and not exempt under section 4(b).

Id. § 514(a) (codified at 29 U.S.C. § 1144(a) (1988)).[5]

[5]Subsection (b) of section 514 provides for various exceptions to the general preemption provision, the most significant of which is the so-called "saving" clause: "Except as provided in subpara-

The scope of ERISA's coverage, and the exceptions to that coverage, are defined in section 4:

> (a) Except as provided in subsection (b) and in sections 201, 301, and 401 [provisions defining coverage more narrowly for certain purposes], this title shall apply to any employee benefit plan if it is established or maintained—
>
> (1) by any employer engaged in commerce or in any industry or activity affecting commerce; or
>
> (2) by any employee organization or organizations representing employees engaged in commerce or in any industry or activity affecting commerce; or
>
> (3) by both.
>
> (b) The provisions of this title shall not apply to any employee benefit plan if—
>
> . . . .
>
> (3) such plan is maintained solely for the purpose of complying with applicable work[ers'] compensation laws or unemployment compensation or disability insurance laws.

Id. § 4 (codified at 29 U.S.C. § 1003 (1988)).

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graph (B), nothing in this subchapter shall be construed to exempt or relieve any person from any law of any State which regulates insurance, banking, or securities." ERISA § 514(b)(2)(A) (codified at 29 U.S.C. § 1144(b)(2)(A) (1988)). Subparagraph (B) is the so-called "deemer" clause, and it provides that no covered plan or trust created under such plan shall be deemed to be an insurance or banking company for purposes of any law of any state purporting to regulate insurance companies, insurance contracts, banks, trust companies, or investment companies. *See id.* § 514(b)(2)(B) (codified at 29 U.S.C. § 1144(b)(2)(B) (1988)); *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 45 (1987).

II. Discussion

A. *Preemption*

Although the Supremacy Clause[6] invalidates state laws that "interfere with, or are contrary to the laws of Congress," *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 211 (1824), the exercise of federal supremacy is not lightly to be presumed. *See Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 522 (1981); *New York State Dep't of Social Servs. v. Dublino*, 413 U.S. 405, 413 (1973). In deciding whether a federal law preempts a state statute, the court's task "is to ascertain Congress' intent in enacting the federal statute at issue." *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 95 (1983). Preemption "may be either express or implied, and [it] 'is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose.'" *Fidelity Fed. Sav. & Loan Ass'n v. De la Cuesta*, 458 U.S. 141, 152-53 (1982) (quoting *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977)).

1. *Legislative History*

Congress expressly provided in section 514(a) of ERISA for federal preemption of all state laws that "relate to" ERISA-covered plans. In favorably reporting the bill to the full Senate, the Committee on Labor and Public Welfare explained that

> [b]ecause of the interstate character of employee benefit plans, the Committee believes it essential to provide for a uniform source of law in the areas of vesting, funding, insurance and portability standards, for evaluating fiduciary conduct, and for creating a single reporting and disclosure system in lieu of burdensome multiple reports.

S. Rep. No. 127, 93d Cong., 1st Sess. 35 (1973), *reprinted in* 1974 U.S.C.C.A.N. 4838, 4871.[7] Similarly, the House

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[6]U.S. Const. art. VI, cl. 2.

[7]The legislative history of ERISA has been compiled and published in a three-volume set. Senate Report No. 127 is reprinted in 1 Subcomm. on Labor of the Senate Comm. on Labor and Pub. Welfare, 94th Cong., 2d Sess., Legislative History of the Employee Retirement Income Security Act of 1974, at 587, 621 (Comm. Print 1976) ("ERISA Legislative History").

Committee on Education and Labor observed that "it is evident that the operations of employee benefit plans are increasingly interstate. The uniformity of decision which the Act is designed to foster will help administrators, fiduciaries and participants to predict the legality of proposed actions without the necessity of reference to varying laws." H.R. Rep. No. 533, 93d Cong., 1st Sess. 12 (1973), *reprinted in* 1974 U.S.C.C.A.N. 4639, 4650.[8]

Although both the House and Senate recognized the need for broad federal preemption in the area of employee benefit plans, the original bills contained preemption language significantly narrower than the version ultimately adopted by Congress. The earlier Senate version provided only for the preemption of all state laws that "relate to the subject matters regulated by this Act or the Welfare and Pension Plans Disclosure Act." H.R. 2 (Senate version), 93d Cong., 2d Sess. § 699(a) (1974).[9] The House version preempted only those laws that "relate to the reporting and disclosure responsibilities, and fiduciary responsibilities, of persons acting on behalf of any employee benefit plan to which part 1 applies." H.R. 2 (House version), 93d Cong., 2d Sess. § 514(a) (1974).[10]

The Conference Committee rejected both the House and Senate formulations in favor of the broader preemption language contained in the present statute, explaining that

> [u]nder the substitute, the provisions of title I are to supersede all State laws that relate to any employee benefit plan that is established by an employer engaged in or affecting interstate commerce or by an employee organization that represents employees engaged in or affecting interstate commerce. (However, following title I generally, preemption will not apply to government plans, church plans ... work[ers'] compensation plans, non-U.S. plans primarily for nonresident aliens, and so called "excess benefit plans.").

H.R. Conf. Rep. No. 1280, 93rd Cong., 2d Sess. 383 (1974), *reprinted in* 1974 U.S.C.C.A.N. 5038, 5162.[11] Representative Dent, ERISA's principal sponsor in the House, spoke in support of the Conference version of the bill:

> Finally, I wish to make note of what is to many the crowning achievement of this legislation, the reservation to Federal authority [of] the sole power to regulate the field of employee benefit plans. With the preemption of the field, we round out the protection afforded participants by eliminating the threat of conflicting and inconsistent State and local regulation.

120 CONG. REC. 29,197 (1974).[12]

2. *Judicial Interpretation*

Section 514(a) "is conspicuous for its breadth. It establishes as an area of exclusive federal concern the subject of every state law that 'relate[s] to' an employee benefit plan governed by ERISA." *FMC Corp. v. Holliday*, 111 S. Ct. 403, 407 (1990). A law relates to an employee benefit plan, "in the normal sense of the phrase, if it has a connection with or reference to such a plan." *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 97 (1983); *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 739 (1985). Under this common-sense meaning of the words, "a state law may 'relate to' a benefit plan, and thereby be pre-empted, even if the law is not specifically designed to affect such plans, or the effect is only indirect." *Ingersoll-Rand Co. v. McClendon*, 111 S. Ct. 478, 483 (1990). While it is true

[8]The House Report is also reprinted in 2 *id.* at 2348, 2359.

[9]The Senate bill is reprinted in 3 ERISA LEGISLATIVE HISTORY, *supra* note 7, at 3599, 3820.

[10]The House bill is reprinted in 3 ERISA LEGISLATIVE HISTORY, *supra* note 7, at 3898, 4057-58.

[11]The Conference Report is also reprinted in 3 ERISA LEGISLATIVE HISTORY, *supra* note 7, at 4277, 4650.

[12]The House floor debates are reprinted in 3 ERISA LEGISLATIVE HISTORY, *supra* note 7, at 4657, 4670; *see also* 120 CONG. REC. 29,933 (1974) (remarks of Senator Williams, principal sponsor of bill in Senate), *reprinted in* 3 ERISA LEGISLATIVE HISTORY, *supra* note 7, at 4731, 4745-46.

that "[s]ome state actions may affect employee benefit plans in too tenuous, remote, or peripheral a manner to warrant a finding that the law 'relates to' the plan," *Shaw,* 463 U.S. at 100 n.21, the Supreme Court has concluded "that state laws which make 'reference to' ERISA plans are laws that 'relate to' those plans within the meaning of § 514(a)." *Mackey v. Lanier Collection Agency & Serv., Inc.,* 486 U.S. 825, 829 (1988) (holding that state law relates to ERISA-covered plan when it provides that plans subject to the provisions of ERISA shall not be subject to the process of garnishment); *Metropolitan Life,* 471 U.S. at 739 (holding that state law relates to ERISA-covered plan when it requires all benefit plans to purchase specified mental-health benefits when they purchase a certain common insurance policy).[13]

A conclusion that a law "relates to" an ERISA-covered plan does not end the preemption inquiry, however. Once a court determines that section 514(a) has been satisfied, it must then check to see whether the law is nonetheless exempt from preemption under section 514(b). *See Pilot Life Ins. Co. v. Dedeaux,* 481 U.S. 35, 48 (1987). Only if the law does not qualify for an exemption from preemption under section 514(b) is it correct to conclude that the law which "relates to" an ERISA plan is preempted.[14]

B. *The District Court's Decision*

The district court in this case concluded that the Equity Amendment Act "relates to" an ERISA-covered employee benefit plan "because benefits under the Act are set by

[13]We agree with the Fifth Circuit that the "*Shaw* 'exception'—that ERISA does not preempt state laws which affect benefit plans in a tenuous or peripheral manner—applies only to laws of general application; it does not protect state laws which specifically refer to ERISA benefit plans." *In re Dyke,* 943 F.2d 1435, 1448 (5th Cir. 1991).

[14]The categories of exempted laws under section 514(b) include state criminal laws and laws regulating insurance, banking, and securities. *See supra* note 5 (discussing "saving" clause); *see also infra* note 27 (discussing exemption for Hawaii's Prepaid Health Care Act).

reference to covered employee benefit plans." Memorandum Opinion at 3. Indeed, appellees do not dispute that the Equity Amendment Act "relates to" an ERISA-covered employee benefit plan.[15]

The district court implicitly recognized that the Equity Amendment Act relates, in fact, to two different plans: First, the Act "relates to" an ERISA-covered plan by requiring that the new benefits be "equivalent" to those already provided under an existing covered plan and by defining the employers who are obliged to provide the new benefits as those who already provide benefits under a covered plan. Second, by requiring new benefits to be provided to employees who have been injured on the job, the Act "relates to" a workers' compensation plan that is, by virtue of the exemption for such plans under section 4(b)(3), exempt from ERISA coverage. So, the Act relates both to an ERISA-covered plan and to a plan that is exempt from ERISA coverage.

The district court relied on *Shaw v. Delta Air Lines, Inc.,* 463 U.S. 85 (1983), for the argument that because the Act related to a plan that was exempt from ERISA coverage, it was saved from preemption. In *Shaw,* the Court considered whether New York's Disability Benefits Law was preempted by ERISA.[16] The Court found that

[15]*See* Brief for Appellees (filed Sept. 6, 1991) at 19-20.

[16]The 1983 version of the Disability Benefits Law provided, in pertinent part, that

> [t]he weekly benefit which the disabled employee is entitled to receive for disability commencing on or after July first, nineteen hundred seventy-four shall be one-half of the employee's average weekly wage, but in no case shall such benefit exceed ninety-five dollars nor be less than twenty-dollars . . . .

N.Y. WORK. COMP. § 204.2 (McKinney 1982-83); *see Shaw,* 463 U.S. at 90 n.4. The Court also faced the question of whether ERISA preempted New York's Human Rights Law. The Court held that the Human Rights Law was preempted only insofar as it prohibited practices that were lawful under federal law. This aspect of the *Shaw* decision is not relevant to our consideration of the issues now before us.

where the law gives employers the option of establishing a separate benefit plan that is exempt from ERISA coverage under section 4(b), such a law would not be preempted.[17] But the state law in *Shaw* related only to an employee disability insurance plan. Relying on the earlier case of *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 523 n.20 (1981), the Court in *Shaw* concluded that where a law relates to a plan that is explicitly exempt from ERISA coverage under section 4(b)—as are all plans maintained solely to comply with disability insurance (and workers' compensation) laws—that law is not preempted. But in our case, as we have already observed, the Equity Amendment Act relates to two plans—one that is ERISA covered and one that is exempt from ERISA coverage. Had the Equity Amendment Act related only to the workers' compensation plan—had it, for example, made no reference to existing ERISA-covered plans and simply required all employers to provide specified minimum health benefits for employees receiving workers' compensation—it would clearly have survived preemption under the principles announced in *Shaw*.

The key issue in distinguishing *Shaw* from this case is that the Court in *Shaw* never found that the New York Disability Benefits Law related to an *ERISA-covered* plan. The Court did find that the Disability Benefits Law plainly related to an "employee benefit plan," *Shaw*, 463 U.S. at 106, but a law is preempted under section 514(a) only if it relates to an employee benefit plan *that is not exempt*. The plan to which the New York Disability Bene-

[17]The Court in *Shaw* recognized that "Congress surely did not intend, at the same time it preserved the [illegible]e of state disability laws, to make enforcement of those laws impossible. A State may require an employer to maintain a disability plan complying with state law as a separate administrative unit." *Shaw*, 463 U.S. at 108. The Court explained further that "while the State may not require an employer to alter its ERISA plan, it may force the employer to choose between providing disability benefits in a separately administered plan and including the state-mandated benefits in its ERISA plan." *Id.*

fits Law related *was* exempt, so the law did not even qualify at the threshold for preemption.

Shaw would have governed this case had the Equity Amendment Act related only to the exempt plan; in that case, the Act would not have been preempted. But *Shaw* does not tell us why an Act that relates to an ERISA-covered plan can avoid preemption simply because it also relates to a plan exempt from ERISA coverage. Not only is there no authority in *Shaw* for this proposition, but it is entirely at odds with ERISA's statutory structure.

Once it is determined that a state law "relates to" an employee benefit plan covered by ERISA, the only escape from preemption is by way of the exemption provisions contained in section 514(b). But no one suggests that the Equity Amendment Act is a criminal law or one regulating insurance, banking, or securities. In purporting to find the source of the exemption to preemption in section 4(b), the district court has misconstrued the statutory scheme. Section 514(a) preempts all state laws that "relate to any employee benefit plan described in section 4(a) and not exempt under section 4(b)," ERISA § 514(a) (codified at 29 U.S.C. § 1144(a) (1988)). Section 4 is the section defining the scope of ERISA coverage. ERISA covers all employee benefit plans (as they are broadly defined in section 4(a)) with the limited exception of the plans explicitly enumerated in section 4(b). The phrase "and not exempt under section 4(b)" is not like the laws described in section 514(b); it is not an exemption to preemption but rather part of the definition of an ERISA-covered plan. In other words, when section 514(a) preempts all laws relating to "employee benefit plans described in section 4(a) and not exempt under section 4(b)," it means that it is preempting all laws relating to employee benefit plans covered by ERISA.[18]

[18]The phrase "employee benefit plan described in section 4(a) and not exempt under section 4(b)" is not unique to the preemption provision. Indeed, a variation of this phrase is used throughout ERISA whenever it defines with greater precision the scope

In upholding the Equity Amendment Act, the district court reached the same conclusion as that of the Second Circuit in *R.R. Donnelley & Sons Co. v. Prevost,* 915 F.2d 787 (2d Cir. 1990), *cert. denied,* 111 S. Ct. 1415 (1991). In *Donnelley,* the court considered the question of whether a virtually identical state workers' compensation law was preempted under ERISA, and it held that the statute was not preempted.[19] The *Donnelley* court distinguished its prior decision in *Stone & Webster Engineering Corp. v. Ilsley,* 690 F.2d 323 (2d Cir. 1982), *aff'd mem. sub nom. Arcudi v. Stone & Webster Engineering Corp.,* 463 U.S. 1220 (1983), which had held that an earlier statute was preempted because it had required employers to extend coverage under their existing health plan to employees receiving workers' compensation payments.[20] In contrast,

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of coverage for a particular part. *See, e.g.,* ERISA § 201 (codified at 29 U.S.C. § 1051 (1988)) ("This part [concerning participation and vesting of pension plans] shall apply to any employee benefit plan described in section 4(a) (and not exempted under section 4(b))"); *see also* ERISA § 301(a) (codified at 29 U.S.C. § 1081(a) (1988)) (concerning funding of pension plans); ERISA § 401(a) (codified at 29 U.S.C. § 1101(a) (1988)) (concerning fiduciary responsibility of plan administrators).

[19]At issue in *Donnelley* was a Connecticut statute that required any employer

> who provides accident and health insurance or life insurance coverage for any employee or makes payments or contributions at the regular hourly or weekly rate for full-time employees to an employee welfare fund ... [to] provide to such employee equivalent insurance coverage or welfare fund payments or contributions while the employee is eligible to receive or is receiving workers' compensation payments pursuant to this chapter ....

CONN. GEN. STAT. § 31-284b(a) (1987); *see Donnelley,* 915 F.2d at 788 n.1.

[20]The statute held to be preempted in *Stone & Webster* provided that no employer

> shall cancel or withhold accident and health insurance or life insurance coverage of any employee or his dependents or

the statute held not to be preempted in *Donnelley* permitted employers to provide the new coverage through separate plans administered independently from existing ERISA plans. In distinguishing *Stone & Webster,* the *Donnelley* court relied on *Shaw.*

But the Second Circuit focused on only half the story. By concentrating on how and in what ways the new workers' compensation plans would be exempt from ERISA coverage, the court failed to appreciate the fact that the Connecticut statute (like the Equity Amendment Act in this case) related to an ERISA-covered plan by tying the new benefits to existing benefits and by limiting the law's applicability to employers already providing benefits through ERISA plans.[21] The statute at issue in *Donnelley* is indistinguishable from the Equity Amendment Act.[22]

> cease to make payments or contributions at the regular hourly or weekly rate for full-time employees for each week of disability to an employee's welfare fund ... while the employee is eligible to receive or is receiving workers' compensation payments ....

CONN. GEN. STAT. § 31-51h(a) (1981) (repealed 1982); *see Stone & Webster,* 690 F.2d at 324 n.1; *see also Fixx v. United Mine Workers,* 645 F. Supp. 352 (S.D. W. Va. 1986) (relying on *Stone & Webster* for conclusion that similar West Virginia disability medical insurance provision was preempted).

[21]According to appellant's counsel, there is a question as to whether or not this argument was ever made to the Second Circuit in *Donnelley.* It does appear to have been raised in the petition for certiorari, which was denied on April 1, 1991, 111 S. Ct. 1415 (1991). *See* Transcript of Hearing on Pending Motions (D.D.C. Mar. 26, 1991) ("Transcript") at 14-16.

[22]The record reflects the fact that the District modelled the Equity Amendment Act on the Connecticut statute which was held not to be preempted in *Donnelley*:

> By the time the statute was passed in October, the Council —and you can see it in their records—was aware of *Donnelley,* at least the district court opinion in *Donnelley,* and changed the language from "maintaining benefits under the old plan," which would clearly have been pre-empted, to "providing benefits that are equal to the old plan."

See Transcript, *supra* note 21, at 9.

Based on a plain reading of ERISA, we disagree with the conclusion of the Second Circuit in *Donnelley* and conclude that the district court in this case erred in holding that the Equity Amendment Act was not preempted.

C. *Policy and Purpose*

Not only do the plain meaning and structure of ERISA itself require the conclusion that the Equity Amendment Act is preempted, but this result also furthers the broad purposes of ERISA preemption. As the Supreme Court has explained,

> ERISA's pre-emption provision was prompted by recognition that employers establishing and maintaining employee benefit plans are faced with the task of coordinating complex administrative activities. A patchwork scheme of regulation would introduce considerable inefficiencies in benefit program operation, which might lead those employers with existing plans to reduce benefits, and those without such plans to refrain from adopting them.

Fort Halifax Packing Co. v. Coyne, 482 U.S. 1, 11 (1987).[23] This concern for minimizing the burden on the administration of ERISA-covered plans is reflected in the decision of the Court in *Shaw*, where it held that the Disability Benefits Law was preempted to the extent that it applied to benefits provided under a multibenefit plan: "An employer with employees in several States would find its plan subject to a different jurisdictional pattern of regulation in each State, depending on what benefits the State mandated under disability, work[ers'] compensation, and unemployment compensation laws." *Shaw*, 463 U.S. at 107.

[23]*Fort Halifax* held that a Maine severance-pay statute was not preempted because it did not relate to an employee benefit *plan*. The Court determined that the Maine statute did not relate to a plan as described in section 4(a). It never reached the alternative argument that the plan was exempt from ERISA coverage under section 4(b). *See Fort Halifax*, 482 U.S. at 6 n.4.

Appellees insist that the Equity Amendment Act would not impose any of these administrative burdens because it allows for the provision of health benefits through a separate plan that employers could administer independently of their ERISA-covered plans. But appellees may underestimate the burden imposed. While it is certainly true that the Equity Amendment Act does not require employers to alter ERISA-covered plans, it explicitly ties the benefit levels of the workers' compensation plan to those of the ERISA-covered plan. In contrast to general state statutes that have only an incidental effect on the administration of ERISA plans, *see, e.g., Mackey v. Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825 (1988) (holding that state's garnishment statute is not preempted by ERISA),[24] the Equity Amendment Act could have a serious impact on the administration and content of the ERISA-covered plan. The fact that the benefits to be provided to an employee receiving workers' compensation will be equivalent to the benefit levels provided while the employee is fully employed means that every time an employer considers changing the benefits under its ERISA-covered plan, it would have to consider the effect that such a change would have on its unique obligations to its District employees receiving workers' compensation.[25] In light of the additional financial burden associated with an increase in ERISA health benefits, an employer might choose to forego such an increase altogether. This could have a substantial effect on the administration of an ERISA-covered plan.

As the Court emphasized in *Fort Halifax*, the central concern of the ERISA preemption provision is to avoid

[24]*Mackey* stands for the proposition that "[t]he fact that collection might burden the administration of a plan [does] not, by itself, compel pre-emption," *Ingersoll-Rand Co. v. McClendon*, 111 S. Ct. 478, 483 (1990).

[25]For the purposes of the District's workers' compensation law, an "employer" is defined as "any individual, firm, association, or corporation . . . using the service of another for pay within the District of Columbia." D.C. CODE ANN. § 36-301(10) (1981).

subjecting ERISA-covered plans to various and differing state regulations. *Fort Halifax,* 482 U.S. at 9. In trying to avoid the obvious preemption problem with requiring employers to extend their existing ERISA plans to employees receiving workers' compensation, *see Stone & Webster Engineering Corp. v. Ilsley,* 690 F.2d 323 (2d Cir. 1982), *aff'd mem. sub nom. Arcudi v. Stone & Webster Engineering Corp.,* 463 U.S. 1220 (1983), appellees have now tried to regulate indirectly what they were forbidden to regulate directly. By requiring employers to take into account the effects that any general decisions about ERISA benefits would have on their responsibilities to their injured employees in the District of Columbia, the District has inevitably affected the administration of an ERISA plan.

But even if it were true that the administration of the ERISA plan would be unaffected by the operation of the Equity Amendment Act, ERISA does not only preempt laws which have such an administrative effect. In *Standard Oil Co. v. Agsalud,* 633 F.2d 760 (9th Cir. 1980), *aff'd mem.,* 454 U.S. 801 (1981), the court affirmed the district court's holding that Hawaii's Prepaid Health Care Act ("Hawaii Act"), HAW. REV. STAT. §§ 393-1 to -51 (1976),[26] was preempted by ERISA:

[26]The Hawaii Act requires employers in that state to provide their employees with a comprehensive health care plan. The state argued that ERISA only preempts laws purporting to regulate private *voluntary* benefit plans. Because the Hawaii Act required employers to provide benefits, the state contended that the plans were beyond ERISA's scope. The Ninth Circuit rejected this argument, holding that "[t]he plans envisioned under the Hawaii statute are ... not rendered outside the definition of employee welfare benefit plans simply because Hawaii has attempted to make them mandatory." *Agsalud,* 633 F.2d at 764. The court also rejected the state's contention that the Hawaii Act was a "disability insurance law" and therefore exempt from ERISA coverage under section 4(b)(3). The Hawaii Act was concerned with providing benefits "regardless of any relationship to a disabling condition," *id.*

> Appellants in the district court argued that since ERISA was concerned primarily with the administration of benefit plans, its provisions were not intended to prevent the operation of laws like the Hawaii Act pertaining principally to benefits rather than administration. There is, however, nothing in the statute to support such a distinction between the state laws relating to benefits as opposed to administration.

Agsalud, 633 F.2d at 765.[27] The Court made the same observation in *Fort Halifax*:

> [S]tate laws requiring the payment of benefits also "relate to a[n] employee benefit plan" if they attempt to dictate what benefits shall be paid under a plan. To hold otherwise would create the prospect that plan administration would be subject to differing requirements regarding benefit eligibility and benefit levels—precisely the type of conflict that ERISA's pre-emption provision was intended to prevent.

Fort Halifax, 482 U.S. at 13 n.8.

It is, of course, evident that many different kinds of state laws may affect an employer's decisions concerning the scope and content of its benefit plans. Congress could have decided to preempt all state laws that "might conceivably have an effect upon" ERISA-covered employee benefit plans, but it chose to draw the line elsewhere. It required that the law specifically "relate to" the ERISA-covered plan—*i.e.,* that it have "a connection with or reference to such a plan." *Shaw,* 463 U.S. at 97. This provision may preempt more than appellees would like, but to the extent that it does, their argument is with Congress and not with us.

[27]Congress amended section 514(b) of ERISA in response to *Agsalud* by explicitly exempting Hawaii's Prepaid Health Care Act from ERISA preemption. *See* Act of Jan. 14, 1983, Pub. L. No. 97-473, § 301(a), 96 Stat. 2605, 2611-12 (codified at 29 U.S.C. § 1144(b)(5) (1988)).

III. Conclusion

For the reasons stated above, the decision of the district court is reversed, and the case is remanded to the district court for further proceedings.

It is so ordered.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 91-0511-LFO

The Greater Washington Board of Trade,
Plaintiff,

v.

District of Columbia and
Sharon Pratt Dixon,
Defendants.

MEMORANDUM

On October 24, 1990, Mayor Barry signed into law the District of Columbia Worker's Compensation Equity Amendment Act of 1990 (the "Act"). *See* Act of October 24, 1990, D.C. Act 8-261 (to be codified as D.C. Code § 36-307(a-1)), *reprinted in District of Columbia Register,* November 2, 1990, at 6890. After a period of congressional review, the Act became effective on March 6, 1991, though regulations implementing it have yet to be promulgated. The pertinent section of the Act requires employers to extend "equivalent" health insurance coverage to employees eligible to receive workers' compensation benefits:

> Any employer who provides health insurance coverage for an employee shall provide health insurance coverage equivalent to the existing health insurance coverage of the employee while the employee receives or is eligible to receive workers' compensation benefits under this act.

Act § 2(c)(2) (to be codified at D.C. Code § 36-307(a-1)(1)). This coverage is to extend for no more than 52 weeks and is to "be at the same benefit level that the employee had at the time the employee received or was eligible to receive workers' compensation benefits." *Id.* (to be codified at D.C. Code § 36-307(a-1)(3)).

Plaintiff Greater Washington Board of Trade ("Board of Trade"), a non-profit corporation that provides health insurance to its employees, now sues to enjoin enforcement of this statute on the grounds that the Act is preempted by the Employee Retirement Income Security Act of 1974 (ERISA). *See* 29 U.S.C. § 1001 *et seq.* (1988). Currently before the Court is the Board of Trade's application for a preliminary injunction and the District of Columbia's motion to dismiss. Although the Board had only four days in which to respond to the District's quite through briefings, at oral argument on March 26, 1991 the Board asked the Court to render judgment in order to expedite consideration of this matter. For the reasons stated below, the District's motion will be granted and the Board's application for a temporary restraining order denied.

I

ERISA's preemption clause provides:

> Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title.

29 U.S.C. § 1144(a). This preemption clause "is conspicuous for its breadth." *FMC Corp. v. Holliday*, 111 S.Ct. 403, 407 (1990). "Its deliberately expansive language was designed to establish pension plan regulation as exclusively a federal concern." *Ingersoll-Rand Co. v. McClendon*, 111 S.Ct. 478, 482 (1990) (quotations and quotation marks omitted). The Board contends, and D.C. concedes, that the Act falls within the broad coverage of this clause because benefits under the Act are set by reference to covered employee benefit plans. *See, e.g., Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 86-87 (1983) ("A law 'relates to' an employee benefit plan, in the normal sense of the phrase, if it has a connection with

or reference to such a plan.") (footnote omitted). The question then is whether the Act falls within one of the preemption clause's exemptions.

One of those exemptions involves laws relating to plans covered by section 1003(b).* *See* 29 U.S.C. § 1144(a) (preempting state laws relating to covered plans only if such plans are "*not* exempt under section 1003(b)") (emphasis added). The pertinent subsection covers plans "maintained solely for the purpose of complying with applicable work[ers'] compensation laws or unemployment compensation or disability insurance laws." *Id.* § 1003(b)(3). The test for determining whether a plan is "maintained solely" for the purpose of complying with a workers' compensation law is "whether the plan, as an administrative unit, provides only those benefits required by the applicable state law." *Shaw v. Delta Air Lines, Inc.*, 463 U.S. at 107. Thus, states cannot directly regulate existing pension plans through workers' compensation laws: Plans which are voluntarily negotiated and "more broadly serve employee needs as a result of collective bargaining" are not covered by section 1003(b). *Alessi v. Raybestos-Manhattan,*

---

* That section provides in full:

> The provisions of this subchapter shall not apply to any employee benefit plan if —
>
> (1) such plan is a governmental plan (as defined in section 1002(32) of this title);
>
> (2) such plan is a church plan (as defined in section 1002(33) of this title) with respect to which no election has been made under section 410(d) of Title 26;
>
> (3) such plan is maintained solely for the purpose of complying with applicable workmen's compensation laws or unemployment compensation or disability insurance laws;
>
> (4) such plan is maintained outside of the United States primarily for the benefit of persons substantially all of whom are nonresident aliens; or
>
> (5) such plan is an excess benefit plan (as defined in section 1002(36) of this title) and is unfunded.

29 U.S.C. § 1003(b).

Inc., 451 U.S. 504, 523 n.20 (1981). However, a state workers' compensation law need not require employers to create independent plans. It is enough if the law gives employers the option of doing so:

> The fact that state law permits employers to meet their state law obligations by including disability benefits in a multibenefit plan does not make the state law wholly unenforceable as to employers who choose that option.
>
> In other words, while the State may not require an employer to alter its ERISA plan, it may force the employer to choose between providing disability benefits in a separately administered plan and including the state-mandated benefits in its ERISA plan.

Shaw v. Delta Air Lines, Inc., 463 U.S. at 108 (citations omitted).

The Act falls squarely within this exemption. Although the Board has not specified how it plans to comply with the Act, it is clear from the Act that it could do so by creating a "separate administrative unit" to administer the required benefits. The Act only instructs employers to "provide health insurance coverage equivalent to the existing health insurance coverage." Act § 2(c)(2). It does not specify how they are to do so. To the contrary, when first introduced the Act required employers to "maintain" existing health care coverage; the D.C. City Council then amended the Act to only require the provision of "equivalent" health insurance coverage. *See* Defendant's Exhibit 1. As a consequence, under *Shaw*, the Board's plan for complying with the Act would be one maintained solely to comply with a state workers' compensation law.

A recent decision from another circuit involving a nearly identical statute reached the same result. In *R.R. Donnelley & Sons Co. v. Prevost*, 915 F.2d 787 (2d. Cir. 1990), the Second Circuit considered a Connecticut statute requiring

employers who provide health insurance to an employee to "provide such employee *equivalent* insurance coverage or welfare fund payments or contributions while the employee is eligible to receive or is receiving workers' compensation payments . . . ." Conn. Gen. Stat. § 31-284b(a) (1989) (emphasis added). The Second Circuit found that, although the Connecticut law was subject to ERISA's preemption clause, *see Donnelley*, 915 F.2d at 791-92, it fell under section 1003(b)(3)'s exemption for plans maintained solely to comply with workers' compensation laws:

> In keeping with, and in apparent reliance upon, the above language in *Shaw*, the State of Connecticut allows an employer under the second option in section 31-284b(b) to "creat[e] an injured employee's plan as an extension of any existing plan for working employees." Such a plan would constitute a "separate administrative unit" within the meaning of *Shaw*, designed "solely for the purpose of complying with [the] applicable workmen's compensation law[]" within the meaning of section 1003(b)(3).

Id. at 793.

B.

The Board contends that *Donnelley* was wrongly decided because the plan in *Donnelley*, like the one at issue here, relates to another ERISA plan. It is not entirely clear what the Board means by this. It might mean that the applicable workers' compensation law is preempted whenever [it] relates to a covered plan regardless of whether the plan is exempt under section 1003(b)(3). Or it might mean that the Board's plan does not qualify for the exemption under section 1003(b)(3) because that plan is itself related to another ERISA plan. It is not, however, necessary to clarify the Board's position because neither contention is persuasive.

The plain language of the statute and the clear holdings of the Supreme Court establish that a workers' compensation law related to an ERISA plan is not preempted if that plan is maintained solely to comply with that law. The

preemption clause contemplates that laws saved by this exemption will relate to ERISA plans: It preempts state laws relating to plans "described in section 1003(a) of this title *and* not exempt under section 1003(b)." 29 U.S.C. § 1144(a) (emphasis added). Thus, laws related to plans covered by ERISA, but exempt under section 1003(b) are not preempted. As the Supreme Court characterized it in *Alessi*, section 1003(b)(3) is an "exemption" to the preemption clause. *See Alessi*, 451 U.S. at 523 n. 21. Under the Board's interpretation, section 1003(b)(3) would not be an exemption to the preemption clause. It would be irrelevant because any law not relating to a covered plan would not be subject to preemption in the first place. Moreover, the Board's interpretation is clearly contradicted by the Supreme Court's decision in *Shaw*. In that case, the Court found that while New York's Disability Benefits Law was "a state law relating to employee benefits plans," it was not preempted because it related to plans exempt from ERISA under section 1003(b)(3). *See Shaw*, 463 U.S. at 106-109.

The Board attempts to distinguish *Shaw* on the ground that the plan at issue in that case did not, as here, incorporate the provisions of another ERISA covered plan. It is difficult to see how this distinction makes a difference. The logic seems to be that there is an implied exception in the section 1003(b)(3) exemption for plans which, though maintained solely to comply with a state workers' compensation law, refer directly to unexempted plans. The problem with this interpretation is that there is no support for it in the statute. Nothing in section 1003(b)(3) indicates that plans relating to other plans are, as it were, exempted from the exemption. It merely states that plans "maintained solely for the purpose of complying with work[ers'] compensation laws" are exempt. Because the "exercise of federal supremacy is not lightly to be presumed," state statutes are not to be preempted "in the absence of persuasive reasons." *Alessi*, 451 U.S. at 522 (quotations and quotation marks omitted). As a consequence, the Board's contention must be rejected.

At points, the Board suggests that an exception to the exemption can be inferred from *Alessi*, but upon analysis that argument must be rejected well. In the first place, *Alessi* only discusses section 1003(b)(3) in a single footnote. The issue in front of the Supreme Court in *Alessi* was whether a New Jersey law prohibiting pension plans from offsetting workers' compensation benefits against pension plan benefits was preempted. Although no plan was maintained solely to comply with this law, the Court nevertheless addressed section 1003(b)(3) in a footnote because the appellants in that case had argued that

> if a plan which is designed to comply with [an] applicable workmen's compensation law is not preempted by ERISA, then *a fortiori* the underlying statute with which such plan is permitted to comply equally escapes coverage.

Alessi, 451 U.S. at 523 n. 20 (quotation and quotation marks omitted). The Court rejected this attempt to exempt all workers' compensation laws by noting that the focus of section 1003(b)(3) is not upon the state law, but rather upon the plans affected by that law. *See id.* ("The only relevant state laws, or portions thereof, that survive this preemption provision are those related to plans that are themselves exempt from ERISA's scope."). The Board seems to infer from this focus upon the plan a requirement that the plan not in any way refer to another ERISA plan. Here again, there is no basis for the inference: The statute only requires that the plan be "maintained solely for the purpose of complying with applicable work[ers'] compensation laws or unemployment compensation or disability insurance laws." 29 U.S.C. § 1003(b)(3).

The Board also contends that its interpretation is supported by the policy underlying ERISA. Specifically, it argues that ERISA intended to insulate employer decisions concerning the provision of "health benefits under an ERISA plan, what level of benefits to provide, and how often to

change the benefits" from the influence of state laws. Application for a Preliminary Injunction at 10. In *Alessi*, however, the Supreme Court held that employers could offset unemployment compensation benefits paid to workers against the amounts owed under an ERISA covered plan. *See Alessi*, 451 U.S. at 521. The Court reasoned that this practice of offsetting was similar to the practice of actually integrating benefits from pension funds with benefits from other sources like social security, a practice that Congress recognized in the legislative history but did not prohibit. *See* H.R. Rep. No. 807, 93d. Cong., 2d Sess. 69 (1974) (noting that ERISA would "not affect the ability of plans to use integration procedures"). Thus, in *Alessi* the Court found that, far from erecting a Chinese wall between ordinary ERISA plans and plans maintained solely to comply with workers' compensation laws, Congress had "acknowledged and accepted" the practice of determining the benefits levels of ERISA plans with reference to workers' compensation benefits. *Alessi*, 451 U.S. at 521.

In sum, to the extent that the Board argues that the workers' compensation law exemption does not apply to laws relating to ERISA plans, it contradicts the plain language of the statute and the holding in *Shaw*. To the extent that the Board seeks to imply a limitation into section 1003(b)(3) for plans referring to other ERISA plans, the Board has failed to show any basis for it in the text of the exemption, in the Supreme Court's decision in *Alessi*, or in the policies underlying the statute.

C.

The Board also contends that the Act is not a workers' compensation law within the meaning of section 1003(b)(3). According to the Board, when Congress passed ERISA in 1974, no workers' compensation laws included health insurance benefits. Ostensibly, the laws at that time only provided for lump sum payments. Because the Act requires employers to provide health insurance, the Board concludes

that the Act is not covered by section 1003(b)(3). The Board has not, however, explained why Congress would have wanted to adopt a static definition of workers' compensation statutes. Furthermore, ERISA contains an extensive set of definitions. *See* 29 U.S.C. § 1002. It is unlikely that in such a highly reticulated statute Congress simply forget to define workers' compensation (or for that matter unemployment compensation and disability insurance). It is much more likely that it intended to incorporate state law definitions. This conclusion is supported by the fact that section 1003(b)(3) refers to workers' compensation *laws* not workers' compensation.

D.

Finally, in a footnote, the Board of Trade suggests that the Act is preempted by the Consolidated Omnibus Budget Reconciliation Act of 1985, 29 U.S.C. § 1161 *et seq.* By itself, such a suggestion is not sufficient to warrant interference with the duly enacted laws of the District of Columbia. *See supra* at 8[26a].

III.

Accordingly, an accompanying order will grant defendants' motion to dismiss, deny plaintiff's application for a preliminary injunction, and dismiss the complaint.

/s/ Louis F. Oberdorfer
UNITED STATES DISTRICT JUDGE

Date: March 27, 1991

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 91-0511-LFO

THE GREATER WASHINGTON BOARD OF TRADE,
Plaintiff,

v.

DISTRICT OF COLUMBIA AND
SHARON PRATT DIXON,
Defendants.

ORDER

For the reasons stated in the accompanying memorandum, it is this 27th day of March, 1991 hereby

ORDERED: that plaintiff's Application for a Preliminary Injunction should be, and is hereby, denied; and it is further

ORDERED: that defendant District of Columbia's Motion to Dismiss the Complaint for Preliminary and Permanent Injunction and Declaratory Judgment should be, and is hereby, granted; and it is further

ORDERED: that the complaint should be, and is hereby, dismissed.

/s/ Louis F. Oberdorfer
UNITED STATES DISTRICT JUDGE

Filed: March 27, 1991

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1991

CIVIL ACTION NO. 91-00511

No. 91-7061

THE GREATER WASHINGTON, BOARD OF TRADE,
Appellant

v.

THE DISTRICT OF COLUMBIA, *et al.*,
Appellees

Before: MIKVA, *Chief Judge;* WALD AND BUCKLEY, *Circuit Judges.*

ORDER

Upon consideration of appellees' Petition for Rehearing, filed December 16, 1991, it is

ORDERED, by the Court, that the petition is denied.

Per Curiam
For The Court:

CONSTANCE L. DUPRE, *Clerk*

/s/ BY: Robert A. Bonner
ROBERT A. BONNER
Deputy Clerk

Filed: January 10, 1992

STATUTES INVOLVED

I. The District of Columbia Workers' Compensation Equity Amendment Act of 1990, D.C. Law 8-198, 37 D.C. Reg. 6890 (1990), codified in scattered sections of D.C. Code Ann. §§ 36-301 to -342.1 (Supp. 1991), provides in pertinent part (D.C. Code Ann. § 36-307 (a-1)):

> (1) Any employer who provides health insurance coverage for an employee shall provide health insurance coverage equivalent to the existing health insurance coverage of the employee while the employee receives or is eligible to receive workers' compensation benefits under this chapter.
>
> (2) For purposes of this subsection the phrase "eligible to receive" means:
>
> (A) An employee is away from work due to a job-related injury for which the employee has filed a claim for workers' compensation benefits under this chapter; or
>
> (B) An employer has knowledge of a job-related injury of an employee who is away from work due to the job-related injury pursuant to which workers' compensation benefits may become due under § 36-315.
>
> (3) The provision of health insurance coverage shall not exceed 52 weeks and shall be at the same benefit level that the employee had at the time the employee received or was eligible to receive workers' compensation benefits.
>
> (4) Except as provided in paragraph (3) of this subsection, an employer shall pay the total cost for the provision of health insurance coverage during the time that the employee receives or is eligible to receive workers' compensation benefits under this chapter, including any contribution that the employee would have made if the employee had not received or been eligible to receive workers' compensation benefits.

II. The Employee Retirement Income Security Act of 1974, 88 Stat. 829, as amended, 29 U.S.C. § 1001 *et seq.*, provides in pertinent part:

> Section 3(1), 29 U.S.C. § 1002(1):
>
> The terms "employee welfare benefit plan" and "welfare plan" mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, or (B) any benefit described in section 186(c) of this title (other than pensions on retirement or death, and insurance to provide such pensions).
>
> Section 4, 29 U.S.C. § 1003:
>
> (a) Except as provided in subsection (b) of this section and in sections 1051, 1081, and 1101 of this title, this subchapter shall apply to any employee benefit plan if it is established or maintained —
>
> (1) by any employer engaged in commerce or in any industry or activity affecting commerce; or
>
> (2) by any employee organization or organizations representing employees engaged in commerce or in any industry or activity affecting commerce; or
>
> (3) by both.
>
> (b) The provisions of this subchapter shall not apply to any employee benefit plan if —
>
> (1) such plan is a governmental plan (as defined in section 1002(32) of this title);
>
> (2) such plan is a church plan (as defined in section 1002(33) of this title) with respect to which no election has been made under section 410(d) of Title 26;

(3) such plan is maintained solely for the purpose of complying with applicable workmen's compensation laws or unemployment compensation or disability insurance laws;

(4) such plan is maintained outside of the United States primarily for the benefit of persons substantially all of whom are nonresident aliens; or

(5) such plan is an excess benefit plan (as defined in section 1002(36) of this title) and is unfunded.

Section 514(a) & (b), 29 U.S.C. § 1144 (a) & (b):

(a) Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title. This section shall take effect on January 1, 1975.

(b)(1) This section shall not apply with respect to any cause of action which arose, or any act or omission which occurred, before January 1, 1975.

(2)(A) Except as provided in subparagraph (B), nothing in this subchapter shall be construed to exempt or relieve any person from any law of any State which regulates insurance, banking, or securities.

(B) Neither an employee benefit plan described in section 1003(a) of this title [section 4(a)], which is not exempt under section 1003(b) [section 4(b)] of this title . . ., nor any trust established under such a plan, shall be deemed to be an insurance company or other insurer, bank, trust company, or investment company or to be engaged in the business of insurance or banking for purposes of any law of any State purporting to regulate insurance companies, insurance contracts, banks, trust companies, or investment companies.

(2)

No. 91-1326

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

THE DISTRICT OF COLUMBIA
AND
SHARON PRATT KELLY, MAYOR,
Petitioners,

v.

THE GREATER WASHINGTON BOARD OF TRADE,
Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia

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BRIEF IN OPPOSITION OF RESPONDENT THE GREATER WASHINGTON BOARD OF TRADE

LAWRENCE P. POSTOL, ESQ.
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The Greater Washington Board of Trade

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

QUESTION PRESENTED FOR REVIEW

Does the Employee Retirement Income Security Act of 1974 ("ERISA") preempt all state laws which relate to a *covered* ERISA plan? In particular, if a workers' compensation law requires an employer to provide an *exempt* ERISA plan, but the law ties the *exempt* ERISA plan's benefit level to the benefit level of a *covered* ERISA plan, is the workers' compensation law preempted? Thus, did the Court of Appeals in the decision below correctly hold that while a workers' compensation law can generally require specified medical benefits for injured workers, where the specified medical benefits are tied to the employer's health insurance benefits level (health insurance being a *covered* ERISA plan), the law is preempted by ERISA?

LIST OF PARTIES

Pursuant to Rule 29.1 of the Rules of the Supreme Court of the United States, Respondent states that it is a non-profit corporation which pursues the interest of the business community in the greater Washington, D.C. area.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-1326

THE DISTRICT OF COLUMBIA
AND
SHARON PRATT KELLY, MAYOR,
Petitioners,

v.

THE GREATER WASHINGTON BOARD OF TRADE,
Respondent.

BRIEF IN OPPOSITION OF RESPONDENT THE GREATER WASHINGTON BOARD OF TRADE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Respondent, The Greater Washington Board of Trade, by its counsel, respectfully submits this brief in opposition to the petition for writ of certiorari to the United States Court of Appeals For The District of Columbia Circuit (hereinafter referred to as "District of Columbia's Petition").

STATEMENT OF THE CASE

The Respondent disagrees with the Petitioners' statement of the case concerning the following points. To begin with, the Petitioners confuse ERISA ter-

minology, and thus a clarification is needed. ERISA deals with "employee benefit plans." 29 U.S.C. §1001(b). Virtually any benefits an employer provides its employees is an "employee benefit plan." *Id.* Thus, the definition includes not only pensions and health insurance, but the definition is so broad it encompasses benefits provided to comply with workers' compensation laws, disability laws, and unemployment compensation laws. If the employer gives a benefit to its employees for virtually any reasons, the system of benefits is an ERISA "employee benefit plan."

ERISA imposes various reporting and fiduciary requirements on plans. 29 U.S.C. §§1021-1031 (reporting and disclosure), 1051-1061 (vesting), 1081-1086 (funding), and 1101-1114 (fiduciary responsibility). The States, however, already regulate reporting and fiduciary requirements for their workers' compensation plans. Thus, in the definition of what ERISA covers, Congress exempted from ERISA's reporting and fiduciary requirements, employee benefit plans which are designed to comply with such workers' compensation laws. 29 U.S.C. §1003(b)(3); *See* S.Rep. No. 93-127, 93th Cong., 1st Sess. 47-48; H.R. Rep. No. 93-1280, 93th Cong., 2nd Sess. 255-56. Hence, while workers' compensation benefit plans are an ERISA "employee benefit plan," they are an *exempt* ERISA plan (the same is true of plans designed to comply with disability laws and unemployment compensation laws). In contrast, as Petitioners concede, health insurance is not exempt from ERISA coverage, and thus it is a *covered* ERISA plan. Petition at 15.

This Court has adopted this terminology of *exempt* and *covered* plans. *See Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 97n.16, (1983) ("Of course, §514(a) pre-

empts state laws only insofar as they relate to *plans covered* by *ERISA*."); *Mackey v. Lanier Collection Agency Service, Inc.*, 486 U.S. 825, 829 (1988) (ERISA §514(a) pre-empts "any and all state laws insofar as they may now or hereafter relate to any employee benefit plan *covered* by the statute."); *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 523n.20 (1981) (referring to "exempted plans"). Thus, the issue is not whether benefits are part of an ERISA "employee benefit plan," the question is whether the ERISA benefit plan is an *exempt* ERISA plan or a *covered* ERISA plan. Of critical import, ERISA preempts state laws which relate to *covered* plans, but ERISA does not preempt state laws which only relate to *exempt* plans. 29 U.S.C. §1144(a).

Three misstatements in the Petition's Statement of the Case also need to be corrected. First, Petitioners state that "ERISA reserves to the state the power to enact legislation governing subjects traditionally within their purview, such as legislation providing benefits to employees pursuant to workers' compensation, unemployment compensation and disability insurance laws, as well as legislation governing insurance, banking, security." Petition at 3. In point of fact, ERISA only saves insurance laws, banking laws, and security laws. 29 U.S.C. §1144(b). Workers' compensation laws (as well as unemployment compensation laws and disability laws) are *not* included in the ERISA saving clause. *Id.*[1]

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[1] Of course, as noted above, *plans* which are designed to comply with workers' compensation laws (as well as unemployment compensation laws and disability laws) are exempt from ERISA's reporting and fiduciary requirements, and thus are referred to as *exempt* plans. 29 U.S.C. §1003(b)(3). This provision protects

Second, The Petitioners' characterization of the Court of Appeals decision herein as containing an "express contradiction" is also inaccurate. Petition at 8. This Court in *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983) in fact held (correctly) that if a law only relates to an *exempt* plan, the law is not preempted; whereas, if the law relates to a *covered* plan, the law is preempted. This Court in *Shaw* had one of each type of law before it, thus one law was held preempted, and one was not. *Id.* at 91 and 106.

Finally, contrary to the Petitions' assertion, Petition at 8, the Court of Appeals in its decision below did identify the administrative burden the District of Columbia workers' compensation law will impose on the covered ERISA plan—the employers' health insurance:

> While it is certainly true that *the [District of Columbia] Equity Amendment Act* does not require employers to alter ERISA-covered plans, it *explicitly ties the benefit levels of the workers' compensation plan to those of the ERISA-covered plan. . . .*The fact that the benefits to be provided to an employee receiving workers' compensation will be equivalent to the benefit levels provided while the employee is fully employed means that *every time an employer considers changing the benefits under its ERISA-covered plan, it would have to consider the effect that such a change would have on its unique obligations to its District employees receiving workers' compensation.* In light of the additional financial burden associated with an increase in ERISA health benefits, an employer might choose to forego such an increase altogether. This could have a substantial effect on the administration of an ERISA-covered plan.

the *plan*, but not the *law*. *See Alessi v. Raybestos Manhattan, Inc.*, 451 U.S. 504, 523n.20 (1981) (emphasis added) (citations omitted) ("They reason that "if a plan which is designed to 'comply with [an] applicable workmen's compensation law' is not preempted by ERISA, then a fortiori the underlying statute with which such plan is permitted to comply equally escapes coverage." *This reasoning wreaks havoc on ERISA's plain language, which pre-empts not plans, but "State laws."* 29 U.S.C. §1144(a). The only relevant state laws, or portions thereof, that survive this preemption provision are those relating to plans that are themselves exempted from ERISA's scope.").

Appendix at 17a - 18a (footnote omitted) (emphasis added). The Court of Appeals also noted, however, that an administrative burden is not required for preemption to apply. Appendix at 18a.

SUMMARY OF THE ARGUMENT

The decision at issue herein by the United States Court of Appeals for the District of Columbia Circuit is admittedly in conflict with a prior decision of the United States Court of Appeals for the Second Circuit. *R.R. Donnelly & Sons Co. v. Prevost*, 915 F.2d 787 (2d Cir. 1990), *cert. denied*, 111 S.Ct 1415 (1991). Both Connecticut and the District of Columbia enacted workers' compensation laws which for purposes of this appeal are identical—the laws require employers to provide a benefit equal to the workers' health insurance (which covers personal illnesses unrelated to any work injury) free of charge for 52 weeks to the extent the employer supplied the worker with health insurance before his injury. Respondent would respectfully submit, however, that this appeal is not

worthy of this Court's review because the decision below of the United States Court of Appeals for the District of Columbia is so clearly correct, that the Untied States Court of Appeals for the Second Circuit should be able to see that its earlier decision was incorrect, and thus overrule it in subsequent litigation.[2] Alternatively, Respondent would respectfully request that this Court grant the Petition, and then summarily affirm the decision below of the United States Court of Appeals for the District of Columbia Circuit.

The Second Circuit held that the Connecticut workers' compensation law is not preempted by ERISA because it relates to an *exempt* ERISA plan—the workers' compensation benefits it requires. If in fact the state mandated health benefits for injured workers were not tied to the employer's health insurance (which insurance is a *covered* ERISA plan), then the Second Circuit's decision would have been correct. The Second Circuit, however, overlooked and indeed never discussed the fact that the workers' compensation law, by triggering and indeed measuring the required health benefit level by the employer's health insurance (a *covered* ERISA plan), impermissibly related to a *covered* ERISA plan thus requiring preemption. The Court of Appeals decision below simply noted that the Second Circuit neglected this critical fact.

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[2] While only two states have enacted such workers' compensation provisions, Respondent can not state that this issue lacks national importance. The Connecticut statute maybe a model for other states, as in fact happened in the District of Columbia, and run away workers' compensation costs are a national concern.

Similarly, the Petitioner's argument that the Court of Appeals decision herein is contrary to this Court's decision in *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, (1983) is simply wrong. The *Shaw* decision dealt, in pertinent part, with a law which only related to an *exempt* ERISA plan, and did *not* relate to a *covered* ERISA plan. Petitioners conceded, as they must, that the District of Columbia workers' compensation law at issue herein is in fact related to a *covered* ERISA plan - the employer's health insurance. As such, the law could only be saved by ERISA's saving clause, 29 U.S.C. §1144(b), which it is uncontroverted does not apply.

ARGUMENT

I. THE DISTRICT OF COLUMBIA CIRCUIT COURT'S DECISION IS SO CLEARLY CORRECT, THAT THE GRANTING OF THE PETITION IS UNNECESSARY. ALTERNATIVELY, THE PETITION SHOULD BE GRANTED, BUT THE DECISION BELOW SHOULD BE SUMMARILY AFFIRMED. BY TYING THE WORKERS' COMPENSATION BENEFITS TO A COVERED ERISA PLAN–THE EMPLOYER'S HEALTH INSURANCE, THE D.C. LAW IMPERMISSIBLY CROSSED THE ERISA PRE-EMPTION LINE: IT RELATES TO A COVERED ERISA PLAN

Section 514(a) of ERISA is clear: if a law relates to a *covered* plan it is preempted; whereas, if it relates to an *exempt* plan it is not preempted. 29 U.S.C. §1144(a). Section 4(b)(3) of ERISA then states, inter alia, that a plan which provides benefits to comply with a workers' compensation law is an exempt plan. 29 U.S.C. §1003(b)(3).

Thus, the District of Columbia workers' compensation law, by requiring health benefits, was estab-

lishing an *exempt* ERISA plan and thus the mere requirement of health benefits does not require preemption. However, by tying the benefit level to the employer's health insurance (which is a *covered* ERISA plan), the law clearly relates to a covered ERISA plan and is thus preempted.

The Court of Appeals in its decision below, merely noted these now obvious points, and observed that the Second Circuit in *R.R. Donnelly & Sons, Co. v. Prevost*, 915 F.2d 787 (2d Cir. 1990), *cert. denied*, 111 S.Ct 1415 (1991) overlooked this second point. Similarly, the Court of Appeals in its decision below noted that this Court's decision in *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983) was inapplicable, because the benefit levels required in that case by the *exempt* plan (one set up to comply with a disability law) were not tied or connected in any way to a *covered* ERISA plan:

> The [District of Columbia] Equity Amendment Act relates, in fact, to two different plans: First, the Act "relates to" an ERISA-covered plan by requiring that the new benefits be "equivalent" to those already provided under an existing covered plan and by defining the employers who are obliged to provide the new benefits as those who are obliged to provide the new benefits as those who already provide benefits under a covered plan. Second, by requiring new benefits to be provided to employees who have been injured on the job, the Act "relates to" a workers' compensation plan that is, by virtue of the exemption for such plans under section 4(b)(3), exempt from ERISA coverage. So,

> the Act relates both to an ERISA-covered plan and to a plan that is exempt from ERISA coverage.
>
> The district court relied on *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983), for the argument that because the Act related to a plan that was exempt from ERISA coverage, it was saved from preemption.
>
> * * *
>
> But in our case, as we have already observed, the Equity Amendment Act relates to two plans—one that is ERISA covered and one that is exempt from ERISA coverage. Had the Equity Amendment Act related only to the workers' compensation plan—had it, for example, made no reference to existing ERISA-covered plans and simply required all employers to provide specified minimum health benefits for employees receiving workers' compensation—it would clearly have survived preemption under the principles announced in Shaw.
>
> The key issue in distinguishing Shaw from this case is that the Court in Shaw never found that New York Disability Benefits Law related to an ERISA-covered plan. The Court did find that the Disability Benefits Law plainly related to an "employee benefit plan," Shaw, 463 U.S. at 106, but a law is preempted under section 514(a) only if it relates to an employee benefit plan that is not exempt. The plan to which the New York Disability Benefits Law related was exempt,

so the law did not even qualify at the threshold for preemption.

Shaw would have governed this case had the Equity Amendment Act related only to the exempt plan; in that case, the Act would not have been preempted. But Shaw does not tell us why an Act that relates to an ERISA-covered plan can avoid preemption simply because it also relates to a plan exempt from ERISA coverage. Not only is there no authority in Shaw for this proposition, but it is entirely at odds with ERISA's statutory structure.

* * *

But the Second Circuit focused on only half the story. By concentrating on how and in what ways the new workers' compensation plans would be exempt from ERISA coverage, the court failed to appreciate the fact that the Connecticut statute (like the Equity Amendment Act in this case) related to an ERISA-covered plan by tying the new benefits to existing benefits and by limiting the law's applicability to employers already providing benefits through ERISA plans.

Appendix at 11a-15a (footnotes omitted).

The analysis of the District of Columbia Circuit in the decision below is so clearly correct, that the involvement of this Court is not warranted. This Court should simply deny the Petition, leaving the Second Circuit to follow the persuasive power of the District of Columbia Circuit's decision. Alternatively, this Court should grant the Petition, and then summarily

affirm the District of Columbia Circuit's decision based on its clearly correct analysis.

Petitioners, apparently realizing the force of the Court of Appeals' analysis, argue in their Petition for a new position adopted by no court—not *Donnelly* or *Shaw*. Petitioners argue that since all workers' compensation laws relate to a *covered* ERISA plan, such laws must be permitted if the plan they require is separate from the *covered* ERISA plan. Not only does such an argument do violence to the statutory language, Petitioner's premise is simply not true. Not all workers' compensation laws relate to a *covered* ERISA plan. To the contrary, virtually all workers' compensation laws do not relate to a covered ERISA plan; rather, such a relationship only occurs in the rare circumstance, such as in the Connecticut and District of Columbia laws discussed herein; where the workers' compensation system ties its benefit levels to the employer's health insurance plan. If that tie is not attempted, there is no relation to a *covered* ERISA plan and hence there is no preemption. That is the whole point of the *Shaw* decision. *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 106 (1983). Indeed, the *Shaw* decision's only limitation is that, to make sure there is no tie to a *covered* ERISA plan, the law can not even require that the *exempt* ERISA plan be part of a *covered* ERISA plan. The law can only permit employers the option to include the two plans together. *Id.* at 208. Petitioners' new argument should thus summarily be rejected.

CONCLUSION

The Petition For Writ Of Certiorari should be denied. Alternatively, the Petition should be granted, and the decision of the Court of Appeals should be summarily affirmed.

Respectfully submitted,

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DATED: March 18, 1992

No. 91-1326

In The

Supreme Court of the United States

OCTOBER TERM, 1991

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AND SHARON PRATT KELLY, MAYOR,
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Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY TO OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

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INTRODUCTION

The District of Columbia replies to the brief in opposition by the Greater Washington Board of Trade. This reply also addresses the brief of the Connecticut Business and Industry Association ("CBIA"), as *amicus curiae*.

The District agrees with the Board of Trade that this case may be summarily disposed of on the merits. It involves only a single legal issue: whether this Court meant what it said when it unanimously ruled in *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983), that state laws, such as disability insurance and workers' compensation laws, are not preempted by ERISA so long as these laws permit employers to furnish state-mandated employee benefits by establishing plans separate from their ERISA-covered plans. The District also

agrees with the CBIA that review is proper now. There is a square conflict between the Second and the District of Columbia Circuits over the meaning of an important provision of an important federal law. In addition, the recent trend of the States to set state-mandated employee benefits by reference to benefits provided in ERISA-covered employee benefit plans favors resolving the Circuit conflict before it widens. However, for the reasons set forth in the District's petition and in this reply, this Court should reverse the decision below.[1]

ARGUMENT

I. THE BOARD OF TRADE IGNORES THE LANGUAGE AND STRUCTURE OF ERISA AND CONGRESS' PLAIN PURPOSE TO PRESERVE STATE DISABILITY INSURANCE, WORKERS' COMPENSATION, AND UNEMPLOYMENT COMPENSATION LAWS.

The Board of Trade urges that ERISA preemption in this case depends on a one-step inquiry — whether a state law "relates to" an ERISA-covered employee benefit plan. Opp. at 7-8. If a state law does not relate to such a plan, it is not preempted; and if a state law relates to such a plan, it is preempted. Thus, in the Board of Trade's view, ERISA treats workers' compensation, disability insurance, and unemployment compensation laws like all other state laws, except for laws governing insurance, banking, and securities.

This approach is flawed. First, it ignores the oft-stated principle, applicable even in ERISA cases, that "the exercise of federal supremacy is not lightly to be presumed" and that "[p]reemption of state law by federal statute or regulation is not favored in the absence of persuasive reasons — either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so

[1] Because the single legal issue in this case has been fully briefed, summary reversal may be appropriate. If, however, this Court should conclude that it wishes further briefing and argument, the petition should be granted for those purposes.

ordained." *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 522 (1981) (internal quotation marks omitted). *Accord Metropolitan Life Insurance Co. v. Massachusetts*, 471 U.S. 724, 740 (1985) (courts "must presume that Congress did not intend to pre-empt areas of traditional state regulation").

Second, the Board of Trade's approach contradicts the language and structure of ERISA, which plainly reveals Congress' purpose to treat state workers' compensation, unemployment compensation, and disability insurance laws differently from laws not singled out for special treatment. In the case of state laws not expressly mentioned in ERISA, this Court has adopted a one-step approach. Such a law is preempted unless it bears such a tenuous relationship to employee benefit plans subject to ERISA that it is not reasonable to conclude that the law "relates to" such plans.[2]

Such a one-step inquiry, however, is improper in the case of state statutes, such as workers' compensation or disability insurance statutes, because an inquiry so limited renders meaningless ERISA's provisions specifically addressing the validity of such statutes.[3] Thus, under such a one-step approach, if such statutes do not "relate to" an ERISA-covered plan, they are outside of ERISA's scope without regard to ERISA's provisions specifically addressing the

[2] *See, e.g., Ingersoll-Rand Co. v. McClendon*, 111 S. Ct. 478 (1990) (ERISA preempts state common law claims for wrongful discharge effected by employer in order to prevent its employees from becoming vested under an ERISA-covered pension benefit plan because such state law claims plainly "relate to" an ERISA-covered plan but also, just as plainly, are not subject to an ERISA exemption from preemption); *Mackey v. Lanier Collection Agency & Service, Inc.*, 486 U.S. 825 (1988) (ERISA does not preempt application of general state garnishment statutes to benefits paid pursuant to employee welfare benefit plans covered by ERISA because relationship of such statutes to ERISA-covered plans is too tenuous, but ERISA does preempt exemption from general garnishment statutes for benefits paid pursuant to such plans).

[3] This Court is bound to give effect to an entire congressional enactment. *See, e.g., Mountain States Tel. & Tel. Co. v. Pueblo of Santa Ana*, 472 U.S. 237 (1985); *Colautti v. Franklin*, 439 U.S. 379, 392 (1979).

validity of such statutes. On the other hand, if such statutes do "relate to" ERISA-covered plans, they are preempted for that reason alone. Under the approach of the Board of Trade, therefore, the provisions of ERISA specifically addressing the validity of workers' compensation, unemployment compensation, and disability insurance statutes are simply irrelevant.

To give effect to these provisions requires a two-part inquiry. The first part asks whether such a law "relates to" ERISA-covered employee benefit plans. The answer to this question is almost always, if not always, going to be affirmative. This is because there is a substantial overlap between employee benefit plans subject to ERISA and state-mandated employee benefits pursuant to workers' compensation, unemployment compensation, and disability insurance laws. Thus, ERISA broadly defines employee benefit plans subject to its coverage as plans providing for medical and similar benefits or for "benefits in the event of sickness, accident, disability, death or unemployment . . .." ERISA § (3)(1), 29 U.S.C. § 1002(1). Furthermore, state workers' compensation and similar laws necessarily confer benefits included within this broad definition.

As a consequence, as this Court recognized in *Shaw*, because it is plain that Congress did not intend to bar such state laws, preemption is not proper simply because such state laws "relate to" ERISA-covered plans. Instead, there must be an additional inquiry — whether the benefits required by state law can be provided in a plan separate from an employer's ERISA-covered plan. In *Shaw*, the state disability insurance law permitted such a separate plan and thus was not preempted to that extent. Similarly, the District's Equity Amendment Act, D.C. Code Ann. § 36-307(a-1) (1991 supp.), permits such a separate plan and should simiarly be found valid.

II. THE DISABILITY INSURANCE LAW IN *SHAW* "RELATED TO" ERISA-COVERED PLANS.

The Board of Trade and the CBIA assert that the disability benefits law in *Shaw* did not relate to, that is, did not have

a connection with or reference to an ERISA-covered plan. Opp. at 7; CBIA Brief at 4. Similarly, they both assert that the District's Equity Amendment Act is legally different from the disability insurance law in *Shaw* because the existence and level of benefits provided to injured workers in the District are set by reference to benefits provided in an employer's ERISA-covered plan for non-injured workers. Opp. at 8; CBIA Brief at 2, 8-9.

These assertions are wrong. First, this Court held in *Shaw* that the state disability benefits law "related to" ERISA-covered plans. See Cert. Pet. at 10-14. Indeed, the fact that the law in *Shaw* related to ERISA-covered plans was underscored by this Court's ruling that employers could comply with the state law by including the state-mandated benefits in their ERISA-covered plans. Second, once a state law has been found to "relate to"an ERISA-covered plan, this Court has drawn only one distinction based on the degree to which a statute relates to an ERISA-covered plan. In the case of a favored statute, such as a state disability insurance or workers' compensation law, it is not preempted so long as an employer can comply with its terms by establishing an employee benefit plan separate from its ERISA-covered plan. See Cert. Pet. at 11-14. *Compare Stone & Webster Eng'g Corp. v. Ilsley*, 690 F.2d 323 (2d Cir. 1982), *aff'd mem. sub nom., Arcudi v. Stone & Webster Eng'g Corp.*, 463 U.S. 1220 (1983), discussed in CBIA Brief at 10 n. 8 and in Cert. Pet. at 16 n.6 & 18.

III. THE CONCEDEDLY PERMISSIBLE WORKERS' COMPENSATION LAWS REQUIRING EMPLOYERS TO PROVIDE HEALTH INSURANCE BENEFITS TO INJURED WORKERS ARE LIKELY TO BE MORE BURDENSOME THAN THE DISTRICT'S EQUITY AMENDMENT ACT.

The Board of Trade concedes that the States and the District of Columbia may require employers to provide health insurance as part of workers' compensation. Opp. at 6, 9, 11. Thus, for example, the District could require employers in

the District having more than 10 employees to provide for up to 52 weeks of comprehensive health insurance for workers injured on the job. At the same time, another jurisdiction could require employers with more than 25 employees to provide, for the entire period of an employee's job-related disability, a different health insurance package. Indeed, as the Board of Trade necessarily concedes, even with ERISA, a multi-state employer properly could be subject to 50 different state workers' compensation laws providing for health insurance, as well as to a District of Columbia law. Furthermore, the health insurance benefits required by those laws could differ from the health insurance benefits employers provide to non-injured workers, and even injured workers, under their ERISA-covered plans.

The Board of Trade is correct that ERISA would not preempt such laws. Preemption is not authorized by Congress despite (1) the obvious administrative difficulties and costs faced by employers in administering 51 exempt workers' compensation plans, providing for various health insurance benefits; and (2) the obvious costs to employers in paying for such benefits in whole or in part. *See Shaw v. Delta Air Lines, Inc.*, *supra*, 463 U.S. at 89-90, 106-09; *cf. Metropolitan Life Insurance v. Co. v. Massachusetts*, *supra*, (upholding a state insurance law, despite ERISA, insofar as it applied to employers which purchase insurance to discharge their ERISA-governed obligations).

Given what the Board of Trade, and indeed the court below, concede is permitted by ERISA, there is no sound reason to attribute to Congress an intent to preempt the less intrusive and more easily administered workers' compensation law enacted by the District of Columbia. This law does not compel employers to alter their ERISA-covered plans to provide the benefits it requires. Instead, as in *Shaw*, employers are given the option of altering their ERISA-covered plans to provide such benefits, if they are not already provided, or to establish plans separate from their ERISA-covered plans to provide such benefits.

IV. ADMINISTRATIVE BURDENS.

The Board of Trade, like the court below, fails to explain how the District's Equity Amendment Act would cause *administrative* difficulties different from those that would be caused by a concededly valid workers' compensation law requiring health insurance. However, the CBIA *amicus* brief suggests: "Employers who change their ERISA plans face the administrative burdens of tracking subclasses of employees whose benefit levels were set based on the plan in effect when they first became eligible to receive workers' compensation." CBIA Brief at 2; see also *id.* at 7.

This argument does not withstand scrutiny. First, employers may face the same "tracking" problems whenever concededly valid workers' compensation laws requiring health insurance benefits are amended. Second, this argument rests on the premise that ERISA's overriding purpose is to ensure that employers are subject only to a single national law in the area of employee benefit plans. See CBIA Brief at 1, 11-12. This is simply not true. The overriding purpose of ERISA is to ensure that employees secure the rights promised them by their employers. See ERISA § 2, 29 U.S.C. § 1001. Furthermore, Congress expressly allowed the States and the District of Columbia to require employers to provide employee benefits pursuant to, for example, insurance laws and workers' compensation laws. As this Court observed in *Metropolitan Life Insurance Co. v. Massachusetts*, *supra*, 471 U.S. at 747, "disuniformities [in employer obligations to provide employee benefits] . . . are the inevitable result of the congressional decision to 'save' local insurance regulation." The same observation applies with equal force to Congress' decision not to supersede all state laws governing workers' compensation and similar employee-protection laws.[4]

---

[4] The District notes only one other matter, the CBIA's reference to that aspect of the Consolidated Omnibus Budget Reconciliation Act of 1985 ("COBRA"), Pub. L. 99-272, 29 U.S.C. §§ 1161-1168, which requires employers in designated circumstances to extend health insurance cover-

[Footnote continued on next page]

CONCLUSION

This Court should grant the petition for a writ of certiorari in this case and reverse the decision of the District of Columbia Circuit.

Respectfully submitted,

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[Footnote coninued from previous page]
age to employees at the employees' own expense. CBIA Brief at 12 n.10. This provision does not support preemption here. It does not purport to affect the status of state workers' compensation laws and the like. Instead, it merely illustrates Congress' recognition of the growing importance of health insurance benefits to workers, a phenomenon which the District is also entitled to recognize in its workers' compensation law.

(3)

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MOTION FOR LEAVE TO FILE AND BRIEF OF THE CONNECTICUT BUSINESS AND INDUSTRY ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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THE DISTRICT OF COLUMBIA AND SHARON PRATT KELLY, MAYOR,

Petitioners,

v.

THE GREATER WASHINGTON BOARD OF TRADE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF OF THE CONNECTICUT BUSINESS AND INDUSTRY ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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The Connecticut Business and Industry Association ("CBIA") respectfully moves for leave to file the accompanying brief as amicus curiae in this case. Letters of consent from the Petitioners, the District of Columbia and Sharon Pratt Kelly, and the Respondent, the Greater Washington Board of Trade, have been filed with this motion.

INTEREST OF AMICUS

The Connecticut Business and Industry Association is the largest business and trade association in the State of Connecticut, having approximately 7,000 members who employ a total work force of over 700,000 employees. CBIA presents the views of its members on public policy and legal issues to legislative and judicial authorities.

Petitioners request Certiorari to overturn a decision of the District of Columbia Circuit. While agreeing with the Petitioners that this case warrants Certiorari, CBIA seeks an affirmance. The District of Columbia statute, which was held to be preempted by ERISA[1] in this case, was modeled on a Connecticut statute. Contrary to the D.C. Circuit's holding, the Second Circuit and the Connecticut Appellate Court have ruled that ERISA does **not** preempt the Connecticut statute.

CBIA's principal interest lies in having this Court resolve the conflicting lower court decisions in favor of the D.C. Circuit's analysis of ERISA preemption. The Connecticut statute imposes significant financial and administrative burdens on nearly all of CBIA's members. Furthermore, many of CBIA's members sponsor multi-state benefit plans which, despite ERISA's express goal of national uniformity, are now subject to disparate local regulations. Finally, the District of Columbia and Connecticut

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[1] The Employee Retirement Income Security Act of 1974, as amended ("ERISA"), codified at 29 U.S.C. §§ 1001-1461 (1988).

statutes represent only two applications of a growing trend among states to impose additional requirements on employers based upon their ERISA-protected plans. This trend adversely affects CBIA and its members.

For all the foregoing reasons, the Connecticut Business and Industry Association respectfully moves for leave to file the accompanying brief as amicus curiae.

Respectfully submitted,

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March 1992

No. 91-1326

In The

Supreme Court of the United States

OCTOBER TERM, 1991

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page**

Statutes

Other Authorities

INTEREST OF THE AMICUS CURIAE

The interest of the Connecticut Business and Industry Association in this case is set forth in the accompanying Motion for Leave To File Brief as Amicus Curiae.

REASONS FOR GRANTING THE WRIT

Summary of Argument

Special and important reasons, including a direct conflict between the D.C. and Second Circuits, support review on Writ of Certiorari of the decision below. Sup. Ct. R. 10.1.(1990). The goal of ERISA's[1] preemption provision "was to minimize the administrative and financial burden of complying with conflicting directives among States . . . ." *Ingersoll-Rand Co. v. McClendon*, __ U.S. __, 111 S. Ct. 478, 484 (1990) (citations omitted). At present, however, two federal circuit courts have rendered conflicting directives on the permissibility of the same form of state regulation. The D.C.[2] and Connecticut[3] statutes at issue in these cases require employers who give benefits to their active employees through ERISA-covered plans to provide the same level of benefits to employees eligible to receive workers' compensation. The direct conflict in the circuits over the viability of these statutes undermines the Congressional intent of "ensur[ing] that plans and plan sponsors would be subject to a uniform body of benefit laws . . . ." *Id.*

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1 The Employee Retirement Income Security Act of 1974, as amended ("ERISA"), codified at 29 U.S.C. §§ 1001-1461 (1988).

2 Workers' Compensation Equity Amendment Act of 1990 (D.C. Act 8-261) ("Equity Amendment Act" or "D.C. statute") (the relevant portion of which is codified at D.C. CODE ANN. § 36-307 (a-1); App. A1-A2).

3 Conn. Gen. Stat. § 31-284b (1991) ("Connecticut Statute") (App. A3).

The definitive split between the D.C. and Second Circuits articulates clearly the important federal issue to be resolved on Certiorari. While little would be gained by allowing for further development of this issue by the lower courts, much could be lost by permitting states to enact other laws that attach themselves to ERISA-protected plans. The D.C. statute typifies an emerging class of state laws that impose special burdens on employers based on the benefits provided in their ERISA-protected plans. Local governments find it administratively convenient to peg new benefit requirements to the level of benefits already being provided in ERISA plans. Thus, the District of Columbia and Connecticut statutes require employers to provide benefits to employees eligible for workers' compensation that are "equivalent" to those given in ERISA-protected plans to active employees. Similarly, states have used employers' existing ERISA benefit levels to define new requirements in other areas, including: plant closings, dependent coverage, family leaves, layoffs and other terminations. This trend defeats the congressional goals of uniform regulation and of encouraging employers to provide employee benefits.

To employers caught in this conflict, the administrative and financial costs are real. CBIA estimates that Connecticut employers who provide health insurance benefits to their active employees must pay an additional $20,315,000 each year to provide "equivalent" benefits to employees eligible for workers' compensation. Employers who change their ERISA plans face the administrative burdens of tracking subclasses of employees whose benefit levels were set based on the plan in effect when they first became eligible to receive workers' compensation. The easiest way for employers to avoid these added costs is to eliminate employee benefits altogether, which cures the problem but kills the patient. Yet for employers in Connecticut, where state and federal courts have upheld the analog to the District of Columbia statute, eliminating or reducing benefits to active employees may well be the only viable alternative -- unless this Court grants Certiorari.

Argument

I. THIS COURT SHOULD GRANT ITS WRIT TO RESOLVE A DIRECT CONFLICT BETWEEN THE DISTRICT OF COLUMBIA AND SECOND CIRCUITS

The Petition seeks review of an important issue regarding a federal statute, ERISA, over which circuit courts have differed. The decision below[4] and *R.R. Donnelley & Sons Co. v. Prevost*, 915 F.2d 787 (2d Cir. 1990), *cert. denied*, _ U.S. _, 111 S. Ct. 1415 (1991) reached squarely conflicting results on whether ERISA preempted similar laws enacted in Connecticut and the District of Columbia. The D.C. Circuit's decision also conflicts with a ruling of the Connecticut Appellate Court, which adopted the Second Circuit's holding in *Donnelley*. *Tufaro v. Pepperidge Farm, Inc.*, 24 Conn. App. 234, 587 A.2d 1044 (1991).

For purposes of ERISA preemption, the Connecticut and D.C. statutes are indistinguishable. *GWBT*, 948 F.2d at 1324. Indeed, the District modeled its Equity Amendment Act on the Connecticut statute, Conn. Gen. Stat. § 31-284b (1991). *GWBT*, 948 F.2d at 1324, n. 22. Both laws require employers who sponsor ERISA-covered benefit plans for their active employees to provide equivalent benefits to employees eligible to receive workers' compensation. Both statutes also allow employers various options for complying with this requirement, including amending their ERISA plans, establishing separate plans, or self-insuring.

In *Donnelley*, the Second Circuit held that the Connecticut statute was "saved from preemption" by section 4(b)(3) of ERISA, 29 U.S.C. § 1003(b)(3). 915 F.2d at 792-94. Section 4(b)(3) exempts from ERISA "plan[s] . . . maintained solely for the purpose of complying with applicable workmen's compensation laws or

4 *Greater Washington Board of Trade v. District of Columbia*, 948 F.2d 1317 (D.C. Cir. 1991) ("*GWBT*")

unemployment compensation or disability insurance laws . . . ." 29 U.S.C. § 1003(b)(3) (1988) (App. A5). The Second Circuit focused on one feature of the Connecticut law: the employer's option to amend its existing plan for all employees or establish a separate plan only for employees receiving workers' compensation. The court compared this option to language in *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983). In *Shaw*, this Court observed that although a State may not require an employer to alter its ERISA plan, it "may force the employer to choose between providing disability benefits in a separately administered plan and including the state-mandated benefits in its ERISA plan." *Shaw*, 463 U.S. at 108.[5] The Second Circuit concluded that the Connecticut law simply put employers to the same choice authorized in *Shaw*. *Donnelley*, 915 F.2d at 793-94.

Unlike the Second Circuit, which relied heavily on *Shaw*, the D.C. Circuit distinguished *Shaw*. The D.C. court noted that the statute in *Shaw* related solely to plans exempt from ERISA – i.e. disability plans to provide benefits based upon weekly wages. *GWBT*, 948 F.2d at 1322-23; *see supra* at note 5. By contrast, the D.C. law relates to both ERISA-covered and exempt plans: it pegs the required benefits to levels set in ERISA-covered plans, and it allows employers to provide these benefits through separate, exempt plans. *Id.* The D.C. Circuit concluded that this distinction rendered *Shaw* irrelevant. *Id.* Thus, the D.C. and Second Circuits disagreed about the meaning and applicability of this Court's decision in *Shaw*.

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5 The New York Disability Benefits Law at issue in *Shaw* required that employers provide disability benefits of $95 per week or one-half the employee's weekly wages, whichever was less. N.Y. Work. Comp. § 204.2 (McKinney 1982-83)(described in *Shaw*, 463 U.S. at 90 n.4). Thus, the statute in *Shaw* did not piggyback onto any ERISA-covered plans by mandating certain benefits based on those given to active employees. *See* ERISA § 3(1), 29 U.S.C. § 1002(1) (1988); 29 C.F.R. § 2510.3-1(b)(1) (1991) (ERISA "employee benefit plan" defined not to include payment of weekly wages).

Moreover, the D.C. Circuit directly criticized the Second Circuit's analysis of the Connecticut statute, and flatly rejected the holding in *Donnelley*:

> [T]he Second Circuit focused on only half the story. By concentrating on how and in what ways the new workers' compensation plans would be exempt from ERISA coverage, the court failed to appreciate the fact that the Connecticut statute . . . related to an ERISA-covered plan by tying the new benefits to existing benefits and by limiting the law's applicability to employers already providing benefits through ERISA plans. The statute at issue in *Donnelley* is indistinguishable from the Equity Amendment Act. Based on a plain reading of ERISA, we disagree with the conclusion of the Second Circuit . . . .

GWBT, 948 F.2d at 1324-25. (footnotes omitted).

By granting its Writ, this Court can readily resolve the clear split between the Second and D.C. Circuits over the proper interpretation of *Shaw* and the correct analysis of ERISA preemption. Moreover, as explained below, important issues of federal law and policy strongly favor granting this Writ.

II. THE CASE BELOW PRESENTS SIGNIFICANT FEDERAL QUESTIONS WARRANTING REVIEW ON CERTIORARI

A. The Financial and Administrative Burdens Imposed by the D.C. and Connecticut Statutes Impel Employers to Eliminate Existing ERISA Plans or Forgo Establishing New Plans.

The D.C. statute and its Connecticut counterpart impose significant and direct financial burdens on employers who sponsor ERISA-covered employee benefit plans. CBIA estimates that in 1991, the cost to Connecticut employers of providing just the health insurance coverage mandated by the Connecticut statute was approximately $20,315,000.[6] While some employers might

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6 This cost estimate is computed as follows:

a. In 1991, the average per employee annual cost to Connecticut employers of providing health insurance was $4,232. Diane Levick, *Employer Health Costs Up*, Hartford Courant, January 28, 1991, at B1 (reporting on the Health Care Benefits Survey prepared by A. Foster Higgins & Co.).

b. The Connecticut Department of Labor estimates that the average Connecticut employee works 1,620 hours per year which, assuming a 7.5 hour workday, translates into 216 workdays per year. Thus, the cost to Connecticut employers of providing health insurance to employees in 1991 was approximately $20 per work day ($4,232 / 216 days).

c. Connecticut workers who were eligible for workers' compensation benefits experienced 1,231,200 days of absence from work in 1990 (the latest year for which such figures are available). *See* Conn. Dept. of Labor, *Connecticut Occupational Injuries and Illnesses Report* (1990).

d. 82.5% of Connecticut workers are covered by employer-provided group health insurance. Lewin/ICF, *Blue Ribbon Comm'n on State Health Insurance Proposal to Expand Access to Health Care in Connecticut* (March 1, 1990). Thus, it can be inferred that 82.5% of the days of absence described in c above were incurred with respect to such employees. Accordingly, approximately 1,015,740 days (1,231,200 days X 82.5%) of employer-provided coverage were mandated by the Connecticut statute in 1991.

e. Therefore, in 1991, the approximate cost to Connecticut employers of providing the health care benefits required by the Connecticut statute was $20,315,000. (1,015,740 days X $20).

voluntarily bear part of this expense (particularly for short-term absences), Connecticut allows for no choice in the matter.

In addition to the direct costs of the additional benefits, these piggyback laws impose several administrative burdens on sponsors of ERISA-protected plans. For example, both the D.C. and Connecticut statutes set the required benefits at the level provided when the employee first became eligible to receive workers' compensation. D.C. Code § 36-307(a-1)(3) (App. A1); *Gagnon v. Liberty Oil Equipment*, 7 Conn. Workers' Comp. Rev. Op. 81 (1989). Thus, each time an employer amends a benefit plan, it may create another subclass of employees with benefits that differ from those in the current plan. Over time in the volatile world of employee benefits, these subclasses may grow in number and range. Indeed, even after an employer terminates a plan or can no longer obtain coverage, it will remain liable to provide benefits defined by earlier plans to all of the subclasses of employees receiving workers' compensation. Furthermore, an employer must not only keep track of all of the subclasses of employees, it will probably have to self-insure the inactive employees because their benefit levels differ from the employer's current plan.

The administrative problems of tracking subclasses of employees are exacerbated in Connecticut, which sets no time limit on the employer's obligation to compensation-eligible employees. Unlike the D.C. statute, which caps the employer's obligation at fifty-two weeks, Connecticut ties the requirement to provide equivalent benefits solely to the employee's eligibility for workers'

compensation. Conn. Gen. Stat. § 31-284b(a) (1991) (App. A3). Since an employee who suffers a "partial permanent disability" may be eligible for compensation indefinitely, an employer's obligation under the Connecticut statute can continue for many years. *See* Conn. Gen. Stat. §§ 31-308(a), 31-308a (1991).

With the cost of providing health insurance benefits to employees rising at an alarming rate, employers are compelled to search for ways to reduce their health insurance expenditures. All too often the only viable alternative for employers is to reduce or even eliminate the health insurance benefits that they provide to employees. Since only employers who do not sponsor ERISA-covered plans are beyond the reach of the D.C. and Connecticut statutes, the statutes provide an additional incentive for employers to forgo creating or maintaining health plans. Moreover, since both statutes piggyback onto the benefit levels in ERISA-covered plans, employers who might otherwise provide generous benefits to active employees are unwilling -- or financially unable -- to do so. Thus, these statutes burden not only ERISA plan sponsors but also their active employee participants and dependents.

Accordingly, this Court should grant its Writ because of the substantial burdens that these statutes impose on ERISA plans.

B. The Petition Raises Serious Concerns Over the National Uniformity of Laws Applicable to ERISA-Covered Plans.

Unless this Court grants its Writ of Certiorari to resolve the conflicting rulings of the D.C. and Second Circuits, the Second Circuit opinion in *Donnelley* will continue to provide states with a road map for circumventing ERISA preemption with respect to piggyback laws in the areas mentioned in ERISA § 4(b)(3): workers' compensation, disability benefits, and unemployment compensation. Under the Second Circuit approach, states may premise and measure employers' obligations to provide these kinds

of benefits based upon the terms of each employer's ERISA-covered plan.

The District of Columbia, Connecticut, and other states have been drawn inexorably to regulate ERISA plans and plan sponsors. States do not ignore the already enormous and still growing economic stature of employee benefits and benefit plans. Administratively, states find the benefits prescribed in ERISA plans to be easy and logical targets. Thus, state laws often attempt to piggyback onto existing ERISA plans, imposing additional obligations that are pegged to benefits provided to active employees. For example, states have passed piggyback laws regarding family leaves, dependent coverage, plant closings, and employee terminations.[7]

This Court's decision in *Ingersoll-Rand* held that a state cannot premise a common law cause of action upon the existence of an ERISA-covered plan. 111 S.Ct. at 482-84. The case below presents a good vehicle through which this Court can make clear that

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[7] *See, e.g., family leave*: D.C. Code Ann. §§ 36-1301 to 36-1317 (1981 & Supp. 1991) (requiring employers to maintain existing health coverage on the same terms for employees who take family leave, and prohibiting loss of such employees' benefits accrued prior to the commencement of a family leave); N.J. Rev. Stat. Ann. §§ 34:11B-1 to 34:11B-8 (1988 & Supp. 1991) (requiring employers to maintain existing health coverage on the same terms for employees who take family leave; held preempted in *New Jersey Business & Indus. Ass'n v. State*, 249 N.J. Super. 513, 592 A.2d 660 (1991)); *dependent coverage*: Cal. Ins. Code § 10123 (Deering 1977 & Supp. 1992) (requiring extension of coverage to dependents if self-insured welfare benefit plan extends coverage to employee after termination); *plant closings*: Conn. Gen. Stat. § 31-51o (1991) (requiring employers to maintain existing group health coverage at employer cost for up to 120 days after a plant closing); Mass. Gen. L. ch. 175, §§ 110D, 110G; ch. 176A, § 8D; ch. 176B, § 6A; ch. 176G, § 4A (1990) (requiring continuation of existing group health coverage on the same terms for up to 90 days); *employee terminations*: Conn. Gen. Stat. § 38a-538 (1991) (requiring that employers, otherwise exempt from COBRA, 29 U.S.C. § 1161-1168 (1988), offer continuation of existing group health coverage); Nev. Rev. Stat. § 689B.245 (1991) (same).

the analysis in *Ingersoll-Rand* applies with equal force to state statutory law. Indeed, the prevalence of piggyback statutes demonstrates the need for this message.

The saga of the Connecticut and D.C. statutes tells a cautionary tale about states' desire to regulate ERISA-covered plans. Initially, Connecticut ordered employers to allow compensation-eligible employees to continue to participate in the employers' ERISA plans. When federal courts held that ERISA preempted Connecticut's forced inclusion of compensation-eligible employees,[8] the state enacted section 31-284b, which simply moved the same substantive requirement to another section of the Connecticut statutes and gave employers various options for compliance.[9] The District of Columbia, following the district court ruling in *Donnelley*, enacted the Equity Amendment Act modeled on the Connecticut statute. *GWBT*, 948 F.2d at 1324, n. 22. The most recent chapter of this tale -- the split between the D.C. and

8 *Stone & Webster Engineering Corp. v. Ilsley*, 690 F.2d 323 (2d Cir. 1982) *aff'd mem. sub nom. Arcudi v. Stone & Webster Engineering Corp.*, 463 U.S. 1220 (1983) held that Conn. Gen. Stat. § 31-51h (1981), the statutory predecessor to Conn. Gen. Stat. § 31-284b, was preempted by ERISA. The current Connecticut statute differs from its preempted predecessor in only one respect: the old law prohibited an employer from removing from its ERISA plan those employees who were eligible for workers' compensation, while the new statute gives the employer the option of keeping such employees in the plan or providing "equivalent" coverage through a separately administered plan.

9 The Connecticut Attorney General aptly summarized the legislative history of the Connecticut statute as follows:

> Section 31-284b was enacted for the purpose of bringing the requirements of section 31-51h into the Workers' Compensation Act *without substantive change*, in response to the District Court decision in *Stone & Webster*, [518 F. Supp. 1297 (D. Conn. 1981)].

1984 Conn. Op. Att'y Gen. 357, 361 No. 87-93 (emphasis added).

Second Circuits -- is not likely to be the last. Indeed, Connecticut continues to enforce its statute, and other states are likely to rely on the Second Circuit's permissive view of plan regulation and piggyback laws.

The split between the D.C. and Second Circuits creates particularly burdensome consequences for employers who sponsor ERISA-covered plans that extend to employees in several states. States now impose conflicting requirements on sponsors of multi-state plans. Moreover, the disparate requirements may grow: states may mandate benefits at levels that differ from the District of Columbia's and Connecticut's requirements (e.g., 80% of the coverage provided to active employees); they may set different mandatory time periods for providing these benefits (e.g., for up to one year of workers' compensation eligibility, as in the District of Columbia, or for the entire period of workers' compensation eligibility, as in Connecticut); or they may require employers to pay the same portion of the cost of coverage as they did when the employee was active (as in Connecticut) or to pay the entire cost of the mandated coverage (as in the District of Columbia). Furthermore, states may target other ERISA plan benefits (e.g., severance pay) as the basis for benefits mandated by statute. Thus, employers who sponsor multi-state benefit plans will not only be burdened by state-imposed obligations because of their ERISA-covered plans; they may well be burdened inconsistently by such obligations.

"Section 514(a) [of ERISA] was intended to ensure that plans and plan sponsors would be subject to a uniform body of benefit laws; the goal was to minimize the administrative and financial burden of complying with conflicting directives among States or between States and the Federal Government." *Ingersoll-Rand*, 111 S. Ct. at 484 (citing *FMC Corp. v. Holliday*, __ U.S. __, 111 S. Ct. at 409; *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 10-11 (1987); *Shaw*, 463 U.S. at 105, and n.25). By imposing an additional statutory requirement based upon the existence and terms of ERISA-covered plans, the D.C. and

Connecticut statutes "subject plans and plan sponsors to burdens not unlike those Congress sought to foreclose through [ERISA] § 514(a)." *Ingersoll-Rand*, 111 S. Ct. at 484.[10]

Blatant circumvention of preemption, which the District of Columbia and Connecticut have attempted and which the Second Circuit decision approves, will necessarily foil the Congressional goal of national uniformity in the regulation of ERISA-covered plans. The obvious option for employers to avoid state laws that piggyback onto the terms of ERISA-covered plans is simply to avoid these plans altogether. *FMC Corp.*, 111 S. Ct. at 408; *Fort Halifax*, 482 U.S. at 11. Ultimately, this will harm the very employees that Congress intended to protect.

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10 The enactment of COBRA (codified at §§ 601-608 of ERISA, 29 U.S.C. §§ 1161-1168 (1988), and § 4980B of the Internal Revenue Code of 1986, as amended, 26 U.S.C. § 4980B (1988)) further supports ERISA's broad preemption of this area. COBRA requires employers maintaining certain group health plans to offer covered employees and their dependents the opportunity to extend coverage, at the employee's cost, upon the occurrence of certain events. Unlike the D.C. and Connecticut statutes, COBRA is a comprehensive and procedurally complete statute. For example, COBRA coverage terminates when the employer discontinues health benefits to active employees and when the COBRA beneficiary becomes covered under any other group health plan or entitled to Medicare benefits. ERISA, § 602(2), 29 U.S.C. § 1162(2) (1988). The enactment of COBRA illustrates the role of ERISA's preemption provision in reserving to Congress the exclusive authority to regulate employee benefit plans.

III. CONCLUSION

For the reasons set forth above, CBIA respectfully requests that this Court grant the petition for Writ of Certiorari and affirm the decision of the D.C. Circuit.

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March 1992

APPENDIX

CONTENTS OF APPENDIX

D.C. Code § 36-307(a-1)

§ 36-307. Medical services, supplies, and insurance.

* * * * * * *

(a-1)(1) Any employer who provides health insurance coverage for an employee shall provide heath insurance coverage equivalent to the existing health insurance coverage of the employee while the employee receives or is eligible to receive worker's compensation benefits under this chapter.

(2) For purposes of this subsection, the phrase "eligible to receive" means:

(A) An employee is away from work due to a job-related injury for which the employee has filed a claim for workers' compensation benefits under this chapter; or

(B) An employer has knowledge of a job-related injury of an employee who is away from work due to the job-related injury pursuant to which workers' compensation benefits may become due under § 36-315.

(3) The provision of health insurance coverage shall not exceed 52 weeks and shall be at the same benefit level that the employee had at the time the employee received or was eligible to receive workers' compensation benefits.

(4) Except as provided in paragraph (3) of this subsection, an employer shall pay the total cost for the provision of health insurance coverage during the time that the employee receives or is eligible to receive workers' compensation benefits under this chapter, including any contribution that the employee would have made if the employee had not received or been eligible to receive workers' compensation benefits.

(5) An employer shall be reimbursed for the provision of health insurance coverage required by this subsection from t he special fund established in § 36-340. If an employer fails to provide health insurance coverage and an employee subsequently procures the insurance coverage and receives reimbursement for the procurement of insurance coverage from the employer pursuant to subsection (d) of this section, the employer shall be reimbursed from the special fund only for the amount that the employer would have paid for the coverage if the employer had provided the coverage.

Conn. Gen. Stat. § 31-284b

Sec. 31-284b. Employer to continue insurance coverage or welfare fund payments for employees eligible to receive workers' compensation. Use of second injury fund. (a) In order to maintain, as nearly as possible, the income of employees who suffer employment-related injuries, any employer, as defined in section 31-275, who provides accident and health insurance or life insurance coverage for any employee or makes payments or contributions at the regular hourly or weekly rate for full-time employees to an employee welfare fund, as defined in section 31-53, shall provide to such employee equivalent insurance coverage or welfare fund payments or contributions while the employee is eligible to receive or is receiving workers'-compensation payments pursuant to this chapter, or while the employee is receiving wages under a provision for sick leave payments for time lost due to an employment-related injury.

(b) An employer may provide such equivalent accident and health or life insurance coverage or welfare fund payments or contributions by: (1) Insuring his full liability under this act tin such stock or mutual companies or associations as are or may be authorized to take such risks in this state; (2) creating an injured employee's plan as an extension of any existing plan for working employees; (3) self-insurance; or (4) by such combination of the above-mentioned methods as he may choose.

(c) In the case of an employee welfare fund, an employer may provide such equivalent protection by making payments or contributions for such hours of contributions established by the trustees of the employee welfare fund as necessary to maintain continuation of such insurance coverage when such amount is less than the amount of regular hourly or weekly contributions for full-time employees.

(d) In the case where workers' compensation payments to an individual for total incapacity under the provision of section

31-307 continue for more than one hundred four weeks, the cost of such accident and health insurance or life insurance coverage after the one hundred fourth week shall be paid out of the second injury fund in accordance with the provisions of section 31-349.

(e) Such accident and health insurance coverage may include but shall not be limited to coverage provided by insurance or directly by the employer for the following health care services: medical, surgical, dental, nursing and hospital care and treatment, drugs, diagnosis or treatment of mental conditions or alcoholism, and pregnancy and child care.

ERISA § 4, 29 U.S.C. § 1003

§1003. COVERAGE.

(a) Except as provided in subsection (b) of this section and in sections 1051, 1081, and 1101 of this title, this subchapter shall apply to any employee benefit plan if it is established or maintained

(1) by any employer engaged in commerce or in any industry or activity affecting commerce; or

(2) by any employee organization or organizations representing employees engaged in commerce or in any industry or activity affecting commerce; or

(3) by both

(b) The provisions of this subchapter shall not apply to any employee benefit plan if

(1) such plan is a governmental plan (as defined in sections 1002(32) of this title);

(2) such plan is a church plan (as defined in section 1002(33) of this title) with respect to which no election has been made under sections 410(d) of title 26;

(3) such plan is maintained solely for the purpose of complying with applicable workmen's compensation laws or unemployment compensation or disability insurance laws;

(4) such plan is maintained outside of the United States primarily for the benefit of persons substantially all of whom are nonresident aliens; or

(5) such plan is an excess benefit plan (as defined in section 1002(36) of this title) and is unfunded.

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STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

In *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983), this Court unanimously ruled that the Employee Retirement Income Security Act ("ERISA") does not preempt state disability insurance laws protecting employees insofar as these laws permit employers to comply with them by establishing an employee benefit plan that is separate from their ERISA-covered employee benefit plans. The issue presented for review is whether, despite *Shaw*, ERISA preempts a state workers' compensation law which requires employers, who provide health insurance to their active employees, to provide equivalent benefits to employees injured on the job even though (1) ERISA treats workers' compensation laws just like disability insurance laws and (2) the workers' compensation law at issue permits employers to comply with it by establishing an employee benefit plan separate from their ERISA-covered employee benefit plans.

TABLE OF CONTENTS

TABLE OF CONTENTS (continued)

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES (continued)

In the Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-1326

THE DISTRICT OF COLUMBIA
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BRIEF FOR PETITIONERS

OPINIONS BELOW

The November 15, 1991, decision of the United States Court of Appeals for the District of Columbia Circuit is reported at 948 F.2d 1317. Cert. Pet. App. 1a-20a. The March 27, 1991, decision of United States District Court for the District of Columbia in Civil Action No. 91-00511 is not reported. Cert. Pet. App. 21a-29a.

JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1). The petition for a writ of certiorari in this case was filed on February 14, 1992, following the denial of a timely petition for rehearing by the court of appeals on January 10, 1992.

STATUTORY PROVISIONS INVOLVED

This case involves both the Employee Retirement Income Security Act of 1974 ("ERISA"), 88 Stat. 829, as amended.

29 U.S.C. § 1001 *et seq.*, and the District of Columbia Workers' Compensation Equity Amendment Act of 1990 ("Equity Amendment Act"), D.C. Law 8-198, codified in scattered sections of D.C. Code Ann. §§ 36-301 to -342.1 (1981 ed. 1988 repl. 1991 supp.). The relevant text of these provisions is reproduced in the appendix to the petition for a writ of certiorari. Cert. Pet. App. 32a-34a.

STATEMENT OF THE CASE

I. INTRODUCTION.

This case raises important issues about the extent to which ERISA restricts the power of the District of Columbia, and the States, to require employers to provide benefits to employees, such as health insurance for themselves and their families, as part of workers' compensation. The court below has held that ERISA precludes the District from requiring employers to provide health insurance benefits to employees who suffer on-the-job injury, illness, or death, whenever these benefits are set by reference to what employers agree to provide their active employees. It has done so even though workers' compensation laws typically set wage-replacement benefits by reference to such employer-employee agreements and even though the provision of health insurance may be an important component of an employee's compensation package.

The District of Columbia believes that this decision is wrong. ERISA does not preclude it, or the States, from enacting workers' compensation laws to ensure that employers, who are in the best position to avoid on-the-job harm to employees, provide an adequate safety net to employees who suffer work-related injury, illness, or death. This safety net may include health insurance to employees who, as active workers, receive such insurance as part of their compensation package. Without this safety net, employees who suffer on-the-job harm, as well as their families, may be forced

to forego needed medical treatment or, if treatment becomes unavoidable, the public may be forced to pay for it.

Indeed, the court below acknowledged that there is nothing in ERISA that prevents the District from correcting what it believes to be such unwise and unfair results. It erred, however, in ruling that ERISA precludes the District from setting this portion of its workers' compensation benefits in the traditional way — by reference to the health insurance benefits received by active workers as a result of agreements with their employers.

II. THE DISTRICT OF COLUMBIA'S WORKERS' COMPENSATION LAW.

The District of Columbia's workers' compensation law requires virtually all employers in the District to compensate their employees who suffer work-related injury, illness, or death, for loss of income and for disability; and it also requires employers to provide medical services and supplies for any such injury or illness. See D.C. Code Ann. § 36-301 *et seq.* (1981 ed. 1988 repl. 1991 supp.).[1] This law is the exclusive remedy available to employees against their employers for such work-related harms. See D.C. Code Ann. § 36-304.

In 1990, the Council of the District of Columbia amended its workers' compensation law by enacting the District of Columbia Workers' Compensation Equity Amendment Act of 1990, D.C. Act 8-261. Following approval by the mayor on October 24, 1990, and the expiration of the congressional review period, the Equity Amendment Act became effective

[1] The Act defines "employer" broadly to include any individual or entity "using the service of another for pay within the District of Columbia," (D.C. Code Ann. § 36-301(10) (1981 ed. 1988 repl.)), and excludes from coverage only a few categories of employees, including "casual employees." See D.C. Code Ann. § 36-301(9) (1981 ed. 1988 repl.); § 36-303(a-2) (1981 ed. 1988 repl. 1991 supp.).

on March 6, 1991. D.C. Law 8-198. See Notice, 38 D.C. Reg. 1752 (1991).[2]

The Act requires employers, who provide health insurance to their employees, to provide equivalent health insurance, for up to 52 weeks, to employees who are receiving, or who are eligible to receive, workers' compensation under the District's workers' compensation law. It states:

> (1) Any employer who provides health insurance coverage for an employee shall provide health insurance coverage equivalent to the existing health insurance coverage of the employee while the employee receives or is eligible to receive workers' compensation benefits under this chapter. . . .
>
> (3) The provision of health insurance coverage shall not exceed 52 weeks and shall be at the same benefit level that the employee had at the time the employee received or was eligible to receive workers' compensation benefits.

D.C. Code Ann. § 36-307(a-1) (1991 supp.).

III. ERISA.

ERISA is a complex federal statute designed to ensure that employees are not unfairly deprived of pension and other employment-related benefits promised by their employers. To achieve this goal, ERISA imposes a number of obligations on employers and, as a corollary of federal regulation, preempts, with important exceptions, state legislation relating to employee benefit plans. For example, ERISA reserves to the states the power to enact legislation governing subjects traditionally within their purview, such as legislation providing benefits to employees pursuant to workers' compensation, unemployment compensation, and

[2] The District of Columbia Self-Government and Governmental Reorganization Act, Pub. L. No. 93-198, § 602(c)(1), 87 Stat. 774, 814 (1973) (codified as amended at D.C. Code Ann. § 1-233(c)(1) (1981 ed. 1991 repl.), requires the Council of the District of Columbia to transmit an act to Congress after approval by the mayor. The act becomes law within thirty legislative days unless Congress disapproves it by a joint resolution.

disability insurance laws, as well as legislation governing insurance, banking, and securities.[3]

ERISA does not mandate substantive benefit terms. Instead, ERISA's central provisions require employer-sponsored employee welfare benefit plans — plans providing for medical and similar benefits or for "benefits in the event of sickness, accident, disability, death or unemployment" — to comply with federal standards governing reporting, disclosure, and fiduciary responsibility.[4] 29 U.S.C. §§ 1021-1031, 1101-1114. ERISA also requires employer-sponsored pension benefit plans to comply with those standards; in addition, such pension plans must comply with federal standards regulating participation, vesting, and funding. 29 U.S.C. §§ 1051-1086. To ensure compliance with its requirements and with employer promises made in the plans it governs, ERISA contains a comprehensive enforcement scheme. *E.g.*, §§ 502 & 510, 29 U.S.C. §§ 1132 & 1140.

As a corollary of federal regulation of employee benefit plans, ERISA preempts state laws that "relate to" such plans, subject to a number of important exceptions. Section 514(a) of ERISA, 29 U.S.C. § 1144(a), states that "*[e]xcept as provided in subsection (b) of this section,*" ERISA

> shall supersede any and all State laws *insofar* as they may now or hereafter *relate to any employee benefit plan described in section 1003(a)* [§ 4(a)] of this title and *not exempt under section 1003(b)* [§ 4(b)] of this title.

[3] Section 3(10) of ERISA, 29 U.S.C § 1002(10), defines the term, "State," as including the District of Columbia.

[4] Section 3(1) of ERISA, 29 U.S.C. § 1002(1), defines an employee welfare benefit plan as including "any plan, fund, or program . . . established or maintained by an employer . . . for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment . . .."

(Emphasis added). Section 4(a), 29 U.S.C. § 1003(a), defining "Coverage," states in pertinent part: *Except as provided in subsection (b) of this section . . .*, this subchapter [, governing reporting, disclosure, and the like,] shall apply to any employee benefit plan if it is established or maintained — (1) by any employer engaged in commerce or in any industry or activity affecting commerce . . .." (Emphasis added). Section 4(b)(3) of ERISA, 29 U.S.C. § 1003(b)(3), in turn, provides:

> (b) The provisions of this subchapter shall not apply to any employee benefit plan if —
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> (3) *such plan is maintained solely for the purpose of complying with applicable workmen's compensation laws or unemployment compensation or disability insurance laws . . . .*[5]

The exemptions from preemption of greatest importance to this case are two. First, ERISA expressly authorizes state workers' compensation, unemployment compensation, and disability insurance laws. Under sections 4(b)(3) and 514(a) of ERISA, employee benefit plans maintained solely for the purpose of complying with such laws are exempt from ERISA's disclosure, reporting, and fiduciary requirements, as well as from its enforcement provisions, and are subject to state regulation.

Second, ERISA contains a limited exemption from preemption for state laws regulating insurance, banking, and securities. Section 514(a), 29 U.S.C. § 1144(a), states that ERISA supersedes state laws relating to employee benefit plans "[e]xcept as provided in subsection (b) of this section." Subsection 514(b), one of the "saving" provisions of the ERISA preemption clause, provides in paragraph (2)(A): "Except as provided in subparagraph (B), nothing in this sub-

[5] (Emphasis added). Section 4(b), 29 U.S.C. § 1003(b), also renders ERISA not applicable to employee benefit plans that are government plans ((b)(1)); church plans ((b)(2)); plans maintained outside the United States for nonresident aliens ((b)(4)); and unfunded excess benefit plans ((b)(5)).

chapter shall be construed to exempt or relieve any person from any law of any State which regulates insurance, banking, or securities." 29 U.S.C. § 1144(b)(2)(A). Subparagraph (B), 29 U.S.C. § 1144(b)(2)(B), the "deemer" provision, prohibits states from, *inter alia*, characterizing employee benefit plans as insurance and thus as subject to state insurance regulation.

IV. THE PROCEEDINGS BELOW.

A. The District Court.

Almost immediately after the District's Equity Amendment Act became effective, the Greater Washington Board of Trade, a not-for-profit corporation which provides health insurance to its employees, brought an action in the United States District Court for the District of Columbia pursuant to 28 U.S.C. § 1331. The Board of Trade sought a declaration that the Equity Amendment Act is preempted by ERISA and an injunction against its enforcement; the District responded by moving to dismiss the complaint for failure to state a claim.

The Honorable Louis F. Oberdorfer ruled that ERISA did not preempt the District's amendment of its workers' compensation law. In so ruling, Judge Oberdorfer relied principally upon two cases: (1) *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983), in which this Court held that a state disability benefits law, requiring employers to provide benefits to women disabled from working because of pregnancy, was not preempted by ERISA; and (2) *R.R. Donnelley & Sons Co. v. Prevost*, 915 F.2d 787 (2d Cir. 1990), *cert. denied*, 111 S. Ct. 1415 (1991), in which the Second Circuit, interpreting *Shaw*, ruled not preempted a state workers' compensation statute on which the District's Equity Amendment Act was modeled. Cert. Pet. App. 22a-26a. In Judge Oberdorfer's view, the Equity Amendment Act, like the disability benefits law in *Shaw*, and the workers' compensation law in *Donnelley*, "related to" employee welfare benefit plans covered

by ERISA. Cert. Pet. App. 22a-23a & 25a. However, the Equity Amendment Act was not preempted for that reason, because that Act, like the statutes in *Shaw* and *Donnelley*, permits employers to comply by establishing an employee benefit plan, separate from their ERISA-covered plans, solely for the purpose of complying with a state statute protected by section 4(b)(3) of ERISA, 29 U.S.C. § 1003(b)(3). Cert. Pet. App. 25a-26a. As a consequence, Judge Oberdorfer denied the Board of Trade's motion for declaratory and injunctive relief and granted the District's motion to dismiss. Cert. Pet. App. 30a.

B. The Court of Appeals.

The United States Court of Appeals for the District of Columbia Circuit reversed. Cert. Pet. App. 1a. According to the court of appeals, if a state law "relates to" an ERISA-covered plan, it can be saved from preemption only if it is a law, such as a law governing insurance, saved by section 514(b) of ERISA, 29 U.S.C. § 1144(b). Cert. Pet. App. 10a, 13a. Here, the Equity Amendment Act relates to ERISA-covered plans by tying the Act's coverage and benefit levels to those established by employers' ERISA-covered plans; and the Equity Amendment Act is not a law encompassed by the saving clause of section 514(b). Cert. Pet. App. 11a-13a. The Equity Amendment Act was therefore preempted even though employers could comply with the Act by establishing and maintaining a plan separate from their ERISA-covered plans. Cert. Pet. App. 15a.

In so ruling, the court acknowledged that *Shaw* "found that where the [state] law gives employers the option of establishing a separate benefit plan that is exempt from ERISA coverage under section 4(b), such a law would not be preempted." Cert. Pet. App. 11a-12a. The court ruled, however, that *Shaw* was distinguishable because, in its view, "the state law in *Shaw* related only to an employee disability

insurance plan" exempt from ERISA, and not "to an ERISA-*covered* plan." Cert. Pet. App. 12a (emphasis supplied by court). Thus, "[t]he plan to which the . . . Disability Benefits Law related *was* exempt, so the law did not even qualify at the threshold for preemption." Cert. Pet. App. 12a-13a (emphasis supplied by court). According to the court, "[h]ad the Equity Amendment Act related only to the workers' compensation plan — had it, for example, made no reference to existing ERISA-covered plans and simply required all employers to provide specified minimum health benefits for employees receiving workers' compensation — it would clearly have survived preemption under the principles announced in *Shaw*." Cert. Pet. App. 12a.

In its opinion, the court of appeals expressly declined to follow the Second Circuit's decision in *Donnelley* even though it recognized that "[t]he statute at issue in *Donnelley* is indistinguishable from the Equity Amendment Act" and that the Second Circuit in *Donnelley* had ruled, based on *Shaw*, that the state statute, on which the District had modeled its Equity Amendment Act, was not preempted by ERISA. Cert. Pet. App. 15a.

Finally, the court of appeals examined the policy and purpose of ERISA. Thus, Congress, in enacting ERISA, was concerned that " '[a] patchwork scheme of regulation would introduce considerable inefficiencies in benefit program operation, which might lead those employers with existing plans to reduce benefits, and those without such plans to refrain from adopting them.' " Cert. Pet. App. 16a, quoting *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 11 (1987). By way of illustration, and in express contradiction of its earlier ruling that the law in *Shaw* did not relate to ERISA-covered plans, the court of appeals explained that Congress'

> concern for minimizing the burden on the administration of ERISA-covered plans is reflected in the decision of the [Supreme] Court in *Shaw*, where it held

> that *the Disability Benefits Law was preempted to the extent that it applied to benefits provided under a multibenefit plan*: "An employer with employees in several States would find its plan subject to a different jurisdictional pattern of regulation in each State, depending on what benefits the State mandated under disability, work[ers'] compensation, and unemployment compensation laws."

Cert. Pet. App. 16a (emphasis added), quoting *Shaw*, *supra*, 463 U.S. at 107.

In the case of the Equity Amendment Act, the court of appeals determined that it "could have a serious impact on the administration and content of the ERISA-covered plan." Cert. Pet. App. 17a. The court failed to identify, however, what potential burden the Equity Amendment Act places on the administration of ERISA-covered plans and held that preemption would be required even if there were no such impact because the Act could have an impact on employer decisions whether to provide health insurance benefits to employees and the level of such benefits. Cert. Pet. App. 18a, citing *Standard Oil Co. v. Agsalud*, 633 F.2d 760 (9th Cir. 1980), *aff'd mem.*, 454 U.S. 801 (1981). This potential impact, according to the court, meant that the District was impermissibly attempting "to regulate indirectly" what it was "forbidden to regulate directly"— the provision of health insurance benefits to employees pursuant to plans covered by ERISA. Cert. Pet. App. 18a.

SUMMARY OF ARGUMENT

The opinion of the court of appeals in this case is in conflict with this Court's unanimous decision in *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983). In *Shaw*, this Court held that the state laws referenced in ERISA's section 4(b)(3), such as state disability insurance and workers' compensation laws, are not preempted by ERISA, even if they "relate to" ERISA-

covered plans, so long as these laws require or permit employers to furnish state-mandated employee benefits by establishing a plan separate from their ERISA-covered employee benefit plans. The District's Equity Amendment Act meets this test because it permits employers to furnish the health insurance benefits it mandates as part of workers' compensation by establishing a plan separate from their ERISA-covered plans.

The Second Circuit in *R.R. Donnelley & Sons Co. v. Prevost*, 915 F.2d 787 (2d Cir. 1990), *cert. denied*, 111 S. Ct. 1415 (1991), correctly interpreted *Shaw*. It ruled that ERISA permits states to enact workers' compensation laws like the District's Equity Amendment Act so long as employers are permitted to comply with such laws by establishing an employee benefit plan separate from their ERISA-covered plans.

By contrast, the D.C. Circuit's conflicting decision is seriously flawed. It errs: (1) in reading *Shaw* as involving a section 4(b)(3) state law that did not "relate to" ERISA-covered plans; (2) in ruling that a section 4(b)(3) state law is preempted whenever it "relates to" such plans because section 4(b)(3) laws are not included in ERISA's section 514(b) saving clause for general state insurance statutes and the like; (3) in emphasizing ERISA's general purpose of avoiding subjecting employers to differing state laws in view of the fact that ERISA expressly exempts from preemption state workers' compensation laws; (4) in charging that the District is attempting to regulate indirectly what it may not regulate directly even though, under the Equity Amendment Act, employers remain free to include or not to include whatever benefits they want for active employees in their ERISA-covered plans, including health insurance benefits; and (5) in failing to understand that a law like the Equity Amendment Act does not differ, for ERISA purposes, from a workers' compensation law establishing employer-paid health insurance benefits set without reference to what employers provide to their active employees.

This Court should reverse the decision of the court below on the ground that, even if the Equity Amendment Act "relates to" ERISA-covered plans in the manner identified by that court, it is nevertheless not preempted under *Shaw* because employers may establish a plan solely for the purpose of complying with the Act. In addition, to avoid future confusion in the lower courts, this Court should also rule that the Act does not "relate to" ERISA-covered plans for the reason given by the court below.

Based on its misunderstanding of *Shaw*, the court below has ruled preempted the District's easily administered workers' compensation law but it has authorized the District to enact a less easily administered law that sets workers' compensation benefits without reference to what employers provide their active workers. In its view, the Equity Amendment Act "relates to" an ERISA-covered plan merely because it sets workers' compensation benefits by reference to benefits provided under ERISA-covered plans, and thus is preempted, whereas the law the court below authorizes would not "relate to" such plans. This decision bears no relationship to the concerns that prompted ERISA.

The overbroad definition of "relate to" adopted by the court below to strike down the Equity Amendment Act was not formulated in light of the principles of federalism that ordinarily inform this Court's judgment in ERISA preemption cases and in light of the language, structure, and purposes of ERISA. When ERISA's preemption language is interpreted in this framework, it becomes clear that a state law should not be held to "relate to" ERISA-covered plans merely because the law expressly refers to benefits provided by such plans in setting benefits to be provided pursuant to an otherwise valid state law. Indeed, this Court has never so held.

Instead, as this Court's ERISA-preemption cases indicate, a state law should be said to "relate to" ERISA-covered plans only if (1) it deals "with the subject matters covered by ERISA — reporting, disclosure, fiduciary responsibility, and the like;" (2) it affects the content or administration of ERISA-covered employee benefit plans in a manner that offends the language or purposes of ERISA; or (3) it conflicts with other provisions of ERISA; such as its exclusive enforcement scheme. *Shaw*, *supra*, 463 U.S. at 98. This definition of "relate to" protects the federal concerns that prompted ERISA regulation of designated employee benefit plans; eliminates the threat of inconsistent non-federal regulation of ERISA-covered employee benefit plans; and strikes a proper balance between those considerations and Congress' plain purpose not to displace unnecessarily traditional and legitimate exercises of state power and authority.

ARGUMENT

I. THE DECISION BELOW IS IN CONFLICT WITH THIS COURT'S DECISION IN *SHAW* MANDATING A TWO-STEP APPROACH IN ANALYZING ERISA PREEMPTION OF WORKERS' COMPENSATION LAWS.

In *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983), this Court unanimously ruled that ERISA does not preempt state legislation requiring employers to provide disability benefits to employees to the extent that such legislation permits employers to comply by establishing an employee benefit plan administratively separate from their ERISA-covered plans. At issue in *Shaw* was a state law which required employers to pay monetary benefits for up to 26 weeks in any one-year period to employees unable to work because of pregnancy or other non-occupational disability, and which tied the level of benefits required to an employee's wages. The disability benefits law was challenged by employers who had employee benefit plans subject to ERISA which did not include all the benefits mandated by the state law.

In *Shaw*, this Court took a two-step approach in determining whether the state law was preempted by ERISA: "The issues are whether the [state laws] . . . 'relate to' employee benefit plans within the meaning of § 514(a), . . . and, if so, whether any exception in ERISA saves them from preemption." *Id.* at 96.[6] According to this Court, "[a] law 'relates to' an employee benefit plan, in the normal sense of the phrase, if it has a connection with or reference to such a plan." *Id.* at 96-97. At the same time, however, it stated that "[s]ome state actions may affect [ERISA-covered] employee benefit plans in too tenuous, remote, or peripheral a manner to warrant a finding that the law 'relates to' the plan." *Id.* at 100 n.21.

This Court ruled that "the Disability Benefits Law plainly is a state law relating to employee benefit plans." *Id.* at 106. The law required employers to provide employee welfare benefits within the meaning of section 3(1) of ERISA (see *supra* at 5 n. 4), and, indeed, some employers subject to the law voluntarily provided some disability benefits pursuant to ERISA-covered plans. *Id.* at 92. Furthermore, the state urged that it had the power to regulate any portion of an employer's ERISA-covered plan that was designed to comply with its disability law. *Id.* at 107.

As a consequence, whether the law was preempted depended on whether "the plans to which it relates are exempt from ERISA under § 4(b)." *Id.* at 106. More specifically, because the state law at issue was an employment-related disability insurance law, preemption turned on the meaning of section

[6] *Shaw* also involved the validity of a state human rights law prohibiting employment discrimination, including discrimination in employee benefit plans, on the basis of pregnancy. This Court ruled that this law was preempted insofar as it prohibited practices by ERISA-covered benefit plans that were lawful under federal law; this Court also ruled, pursuant to section 514(d) of ERISA, 29 U.S.C. § 1144(d)(4), a provision which saves other federal laws from preemption, that the state human rights law was not preempted to the extent that it prohibited practices that were also prohibited by federal law.

4(b)(3) of ERISA, which exempts from ERISA coverage employee benefit plans " 'maintained solely for the purpose of complying with applicable [workmen's compensation laws or unemployment compensation or] disability insurance laws.' " *Id.*, quoting 29 U.S.C. § 1003(b)(3).

This Court identified two problems in resolving this issue. First, some of the employers affected by the state law had multibenefit plans governed by ERISA that provided benefits not required by the state law; and the state had urged that it could regulate any parts of such plans which provided the benefits required by its law. *Id.* at 106-07. This was problematic because the plans exempted from ERISA under section 4(b)(3) encompass only plans "maintained solely" to comply with the designated state laws. "The test" for determining this matter, this Court ruled, is "whether the plan, as an administrative unit, provides only those benefits required by the applicable state law." *Id.* at 107. Thus, because there cannot be mutually exclusive pockets of federal and state jurisdiction within a plan, "[o]nly separately administered disability plans maintained solely to comply with the Disability Benefits Law are exempt from ERISA coverage under § 4(b)(3)." *Id.* at 108.

The second problem confronting this Court in *Shaw* was to prevent employers from evading lawful state regulation of employee welfare benefits pursuant to workers' compensation, unemployment compensation, and disability insurance laws by the expedient of adopting multibenefit plans subject to ERISA that combine benefits inferior to those required by state law with other benefits. To keep from making enforcement of these state laws "impossible," a result "Congress surely did not intend," this Court held in *Shaw* that such laws are not preempted by ERISA so long as they give employers the option of complying with them by establishing plans that are administratively separate from their ERISA-covered plans. *Id.* at 108. In a key passage, this Court articulated the central principle governing ERISA preemp-

tion of state workers' compensation, unemployment compensation, and disability insurance laws as follows:

> A State may require an employer to maintain a disability plan complying with state law as a separate administrative unit. Such a plan would be exempt under § 4(b)(3). The fact that state law permits employers to meet their state-law obligations by including disability insurance benefits in a multibenefit ERISA plan . . . does not make the state law wholly unenforceable as to employers who choose that option.
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> In other words, *while the State may not require an employer to alter its ERISA plan, it may force the employer to choose between providing disability benefits in a separately administered plan and including the state-mandated benefits in its ERISA plan.* If the State is not satisfied that the ERISA plan comports with the requirements of its disability insurance law, it may compel the employer to maintain a separate plan that does comply.

Id. at 108 (emphasis added). As applied to the disability benefits law, this Court held that the state could not enforce the law by requiring employers to alter their ERISA-covered plans and that the law was *preempted* to that extent. This Court also held that the law *was not preempted* to the extent that it required a separate plan, or gave employers the option of establishing a separate plan, to comply with its terms.

Given this Court's rulings in *Shaw* that the disability benefits law was preempted in part and not preempted in part, it is apparent that *Shaw* rests on two fundamental principles. First, *Shaw* recognizes that benefits required by workers' compensation, unemployment compensation, or disability insurance laws are, *by definition*, employee welfare benefits within the meaning of section 3(1) of ERISA, 29 U.S.C. § 1002(1), that is, "benefits in the event of sickness, accident, disability . . . or unemployment." As a consequence, such state laws necessarily will "relate to" ERISA-covered employee welfare benefit plans. Second, to avoid pre-

emption of all state laws governing workers' compensation, unemployment compensation, and disability benefits — a result Congress plainly did not intend in view of ERISA's express preservation of such laws — *Shaw* allows states to enact such laws so long as these laws require or permit employers to comply by establishing an employee benefit plan separate from their ERISA-covered plans. To rule otherwise would allow employers to evade compliance with workers' compensation, unemployment compensation, and disability insurance laws by establishing an ERISA-covered employee welfare benefit plan combining benefits not required by state law with benefits inferior to those required by state law.[7] In short, the fact that a state law described in section 4(b)(3) of ERISA "relates to" ERISA-covered plans is not necessarily fatal.

Like that part of the disability benefits law held not preempted in *Shaw*, the District's Equity Amendment Act does not require employers to alter their ERISA-covered employee welfare benefit plans. Instead, it simply provides that employers, otherwise subject to the District's workers' compensation law, who provide health insurance to active employees, shall provide equivalent health insurance to employees who receive, or who are eligible to receive, other workers' compensation benefits. Furthermore, the Equity Amendment Act permits employers to comply with its terms by establishing a plan that is administratively separate from their ERISA-covered plans. As this Court ruled in *Shaw*, there is no preemption bar to this Act. Instead, the Act is well within the workers' compensation laws that Congress expressly declined to preempt in ERISA.

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[7] Had *Shaw* not construed ERISA in this manner, employers could have triggered ERISA preemption of workers' compensation laws by, for example, including as part of their ERISA-covered multibenefit welfare plans a provision granting employees disabled by on-the-job injury or illness wage-replacement benefits inferior to those required by such state laws.

II. THE SECOND CIRCUIT IN *DONNELLEY*, NOT THE COURT BELOW, CORRECTLY APPLIED *SHAW*.

A. The Second Circuit in *Donnelley*.

In *Donnelley*, the Second Circuit correctly ruled that ERISA does not preempt a workers' compensation law requiring employers, who provide health insurance to their employees, also to provide equivalent benefits to employees eligible to receive workers' compensation. In so ruling, the Second Circuit recognized that, under *Shaw*, the statute "related to" ERISA-covered employee welfare benefit plans. Indeed, one of the employers who challenged the state statute provided in its ERISA plan for up to 104 weeks of health insurance for employees receiving workers' compensation. 915 F.2d at 790.

However, the statute was not preempted pursuant to *Shaw's* interpretation of the exemption from preemption for state laws governing employee benefit plans maintained solely for the purpose of complying with state workers' compensation, unemployment compensation, or disability insurance statutes. Furthermore, the Second Circuit found significant the "caveat" in *Shaw* that ERISA should not be construed to allow employers to circumvent such state laws by establishing ERISA-covered employee benefit plans combining benefits inferior to those required by state law with other benefits not required by state law. 915 F.2d at 793. Although R.R. Donnelley's ERISA-covered plan provided health insurance benefits to employees disabled by on-the-job harms, these benefits were not provided for as long a period of time as that mandated by the state law.

The Second Circuit also distinguished its earlier decision in *Stone & Webster Eng'g Corp. v. Ilsley*, 690 F.2d 323 (1982), *aff'd mem. sub nom., Arcudi v. Stone & Webster Eng'g Corp.*, 463 U.S. 1220 (1983), in which it had ruled preempted a state statute requiring employers who provide health insurance to their active employees to provide equivalent health insurance to injured workers. That earlier statute was different,

the Second Circuit ruled, because, *inter alia*, it required employers to provide such benefits by altering their ERISA-covered plans and did not give them the option, found critical in *Shaw*, of establishing a plan solely for the purpose of complying with the workers' compensation law. 915 F.2d at 789.

B. The Decision of the Court Below.

The decision of the court below squarely conflicts with *Shaw* and this Court's other decisions in a number of respects:

1. The court of appeals ignored *Shaw's* holding that state legislation encompassed by section 4(b)(3) of ERISA is not preempted, even if it "relates to" ERISA-covered plans, insofar as employers may comply with such laws by establishing employee benefit plans solely for that purpose. Instead, it erroneously interpreted *Shaw* as merely ruling that the New York disability insurance law was not preempted because the law did not "relate to" ERISA-covered plans.[8] The error in interpreting *Shaw* is apparent upon further examination of its opinion. Thus, the court of appeals elsewhere in its opinion described *Shaw* as holding that "the Disability Benefits Law was preempted to the extent that it applied to benefits provided under a multibenefit plan" subject to ERISA. Cert. Pet. App. 16a.[9] Yet the court failed

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[8] The ruling of the court below is particularly surprising in view of the fact that it discussed (Cert. Pet. App. 2a n.1, 10a) this Court's later decision in *Metropolitan Life Insurance Co. v. Massachusetts*, 471 U.S. 724 (1985), where this Court described *Shaw* as a case "where we held that the . . . State's Disability Benefits Law 'relate[d] to' welfare plans governed by ERISA." *Id.* at 739.

[9] This description is, however, somewhat inaccurate. The basic ruling in *Shaw* was that the disability benefits law was not preempted. 463 U.S. at 109. However, this Court made clear that New York could not enforce this law by compelling employers to alter their ERISA-covered plans or by regulating state-mandated benefits it permits employers to provide in their ERISA-covered plans. At the same time, however, employers could not evade the requirements of the state law by establishing multibenefit plans. They had to comply with the law either by including the state-mandated

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to appreciate the significance of its description: the New York law would not have been preempted by ERISA to any extent unless it had related to ERISA-covered plans. As a consequence, the court below also failed to recognize that the New York law was not totally preempted even though it related to ERISA-covered plans.

2. The court of appeals erroneously ruled that, because ERISA does not list workers' compensation laws in its "saving" clause (§ 514(b)), along with state insurance laws, workers' compensation laws are preempted whenever they "relate to" ERISA-covered plans. The fact that the preemption provision of ERISA, section 514(a), incorporates a saving clause for state insurance and other laws, does not negate the statutory exemption from preemption in section 514(a) for laws, such as workers' compensation and disability insurance laws, that require or permit employers to establish plans exempt from ERISA coverage by virtue of section 4(b)(3). Indeed, this Court in *Shaw* described both "[s]ections 4(b)(3) and 514(b)" as provisions "which list specific exceptions" to preemption. 463 U.S. at 104.

3. The court of appeals erred in stating that the District has impermissibly "tried to regulate indirectly what" it is "forbidden to regulate directly." Cert. Pet. App. 18a. To the contrary, all that the Equity Amendment Act does is to require employers, who provide health insurance to their active employees, to provide equivalent health insurance, for up to 52 weeks, to their employees entitled to workers' compensation. This requirement is imposed on virtually all employers in the District of Columbia, including employers,

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benefits in their ERISA-covered plans or by establishing plans solely for the purpose of complying with the law. Finally, if New York was not satisfied that an employer's ERISA-covered plan complied with state law, New York could require the employer to provide the state-mandated benefits in a separate plan subject to state regulation.

such as the District itself and churches, whose general employee welfare benefit plans are exempt from ERISA pursuant to sections 4(b)(1) and (2), 29 U.S.C. §§ 1004(b)(1) & (2). See *supra* at 3 n.1 & 6 n.5. Furthermore, in the case of employers whose general employee welfare benefit plans are subject to ERISA, the Equity Amendment Act does not require them to alter such plans to provide health insurance benefits to employees eligible for workers' compensation, and it does not purport to regulate the benefits provided by such plans or the administration of such plans. Under the Equity Amendment Act, employers remain free to alter their ERISA-covered plans as they deem appropriate, and employers may comply with this Act by establishing a plan separate from their ERISA-covered plans, *i.e.*, a plan established solely for the purpose of complying with the Equity Amendment Act.

Nor does the possibility that the Equity Amendment Act may have some impact on employers' decisions concerning employees' compensation packages, including health insurance, or may increase their administrative costs convert this permissible law into an impermissible indirect regulation of ERISA-covered plans. Thus, even a workers' compensation law, like that approved by the court below — in which the state sets standards of eligibility and levels of compensation without regard to what employers are providing to their active employees — might cause employers to reevaluate their employee compensation packages, including benefits provided by ERISA-covered plans. This would be true whether such plans provided no health insurance benefits to injured workers, 30 days of such benefits, or even 104 weeks of such benefits. In addition, such a statute would cause employers administrative difficulties as great as, or even greater than, those caused by the Equity Amendment Act. For example, under the law approved by the court of appeals, employees would likely have available to them two different insurance packages, one for active workers and another for injured workers, a matter likely to cause em-

ployee confusion and greater administrative costs. Such a statute would not, of course, be preempted by ERISA, however, so long as employers could comply with it by establishing an employee benefit plan separate from their ERISA-covered plans.

4. The emphasis of the court of appeals on section 514(a)'s purpose to avoid subjecting employers to differing state laws is misplaced. Workers' compensation benefits have long been subject to state regulation and, in fact, have varied from state to state. Furthermore, as *Shaw* itself demonstrates, even with ERISA, employers properly may be faced with differing state law obligations, imposed by statutes regulating matters such as workers' compensation and nonoccupational disability. As this Court noted in the case of state insurance laws, "disuniformities [in employer obligations to provide employee benefits] . . . are the inevitable result of the congressional decision to 'save' local insurance regulation." *Metropolitan Life Insurance Co. v. Massachusetts*, 471 U.S. 724, 747 (1985). That observation applies with equal force to Congress' decision not to supersede all state laws governing workers' compensation and similar employee-protection laws. Because Congress expressly has allowed the States and the District of Columbia to require employers to provide employee benefits pursuant to section 4(b)(3) state laws, disuniformities in this area are inevitable.

Even under the analysis of the court of appeals, moreover, an employer could be subject to differing state workers' compensation laws requiring health-insurance benefits. Thus, that court would permit the District to require employers to provide for up to 52 weeks of comprehensive health insurance for workers injured on the job so long as its law did not expressly refer to benefits provided by ERISA-covered plans. At the same time, it would permit another jurisdiction to require employers to provide, for the entire period of an employee's job-related disability, a different health insurance package. Indeed, as the court of appeals acknowledged, even with ERISA, a multi-state employer properly could be subject to 50 different state workers' compensation laws providing for wage replacement and other benefits, including health insurance, as well as a District of Columbia law. Preemption would not be authorized by Congress despite the administrative difficulties and costs that would be faced by employers in administering 51 different exempt workers' compensation plans.

Given what the court below acknowledged is permitted by ERISA, there is no sound reason to attribute to Congress an intent to preempt the less intrusive and more easily administered workers' compensation law enacted by the District of Columbia. This law does not compel employers to alter their ERISA-covered plans to provide the benefits it requires. Instead, as *Shaw* expressly authorizes, employers are given the option of altering their ERISA-covered plans to provide such benefits, if they are not already provided, or to establish a plan separate from their ERISA-covered plans to provide such benefits.

5. The court of appeals erred in ruling that the Equity Amendment Act is different, for ERISA purposes, from a workers' compensation law that sets health insurance benefits for injured employees without reference to health insurance benefits provided by employers pursuant to their ERISA-covered plans. First, in the context of this case, the concerns of ERISA are implicated only because the District, pursuant to its workers' compensation law, is requiring employers to provide employee welfare benefits. The concerns of ERISA are not implicated because, in requiring such benefits, the District has selected one method rather than another of determining the benefits to be provided under its workers' compensation law. Indeed, the court of appeals has turned the concerns of ERISA upside down — in its view, the concerns of ERISA are not implicated by the District's requirement that employers provide benefits but are implicated only by the method the District has selected to estab-

lish eligibility for benefits and to calculate the level of benefits to be provided. However, because the District may require workers' compensation benefits, the particular method it selected to determine these secondary matters is irrelevant to ERISA and too "peripheral" to the concerns of ERISA "to warrant a finding" that this aspect of the Equity Amendment Act " 'relates to' " an ERISA-covered plan. *Shaw*, *supra*, 463 U.S. at 100 n.21. See also Part III, *infra*, at 25-36.

In light of the foregoing, there is no basis for holding that ERISA precludes the District from taking into account — with the precision of the Equity Amendment Act — the economic realities of the employment relationship and the economic realities of the losses an employee may suffer when he is disabled from working by a job-related injury or illness. First, wages of employees may vary depending on whether health insurance is part of their compensation package. Second, wage-replacement benefits provided under laws protected by section 4(b)(3) are customarily set by reference to wages paid to active employees pursuant to agreements with their employers. See 2 A. Larson, Workmen's Compensation Law § 60.00 (1992) ("The normal unit by which [wage-replacement] benefits are measured consists of a fixed statutory percentage, usually between one-half and two-thirds, of 'average weekly wage.' "); *Shaw*, *supra*, 463 U.S. at 89 (observing that New York's Disability Benefits Law requires employers to pay employees disabled from working because of nonoccupational injuries or illnesses "the lesser of $95 per week or one-half their average weekly wage"). As both the Equity Amendment Act and the Connecticut law construed in *Donnelley* recognize, health insurance is an important component of an employee's compensation package, a component that should not be lost whenever an employee suffers a disabling work-related injury.[10]

[10] The Connecticut workers' compensation statute at issue in *Donnelley* was explicit on this point. Conn. Gen. Stat. § 31-275(14) (1989) defined "income" for purposes of the statute as "all forms of remuneration to an individual from his employment, including wages, accident and health insurance coverage, life insurance and employee welfare plan contributions."

In short, under *Shaw*, the Equity Amendment Act is valid. It is valid, moreover, whether or not it "relates to" ERISA-covered plans in the manner identified by the court below. Because the Act permits employers to comply with it by establishing a plan separate from their ERISA-covered plans, *Shaw* makes clear that it is not preempted.

III. THIS COURT SHOULD REJECT THE DEFINITION OF "RELATE TO" ADOPTED BY THE COURT BELOW TO ENSURE THAT THIS CONCEPT IS NOT CONSTRUED SO BROADLY THAT VALID STATE LAWS ARE PREEMPTED.

This Court should reverse the decision of the court below on the ground that, even if the Equity Amendment Act "relates to" ERISA-covered plans in the manner identified by that court, it is nevertheless not preempted under *Shaw* because employers may establish a plan solely for the purpose of complying with the Act. However, for the reasons already set forth and for the reasons that follow, this Court should also rule that the Act does not "relate to" ERISA-covered plans for the reason given by the court below in order to prevent courts in the future from ruling preempted other valid state laws.

A. The Court Below Defined "Relate To" Too Broadly.

The decision of the court below is bizarre. Based on its understanding of *Shaw*, the court has ruled preempted a clear, easily administered workers' compensation law that does not require employers to modify their ERISA-covered plans in any respect. According to that court, the Equity Amendment Act is preempted because it sets workers' compensation benefits by reference to benefits provided for active workers by ERISA-covered plans and thus fatally "relates to" ERISA-covered plans. Also based on its understanding of *Shaw*, the court would uphold a more complex and less easily administered workers' compensation law on the grounds that it does not "relate to" ERISA-covered plans.

This decision bears no relationship to any of the concerns that prompted ERISA. Furthermore, both *Shaw* itself, as well as this Court's other ERISA jurisprudence, support defining this concept more narrowly than did the court below. A more narrowly defined concept is necessary to reflect the principles of federalism that ordinarily inform this Court's judgment in preemption cases and to account for the language, structure, and purposes of ERISA itself. A state law should not be held to "relate to" ERISA-covered plans merely because the law expressly refers to benefits provided by such plans in setting benefits to be provided pursuant to the state law.

The District of Columbia proposes the following definition. A state law should be said to "relate to" ERISA-covered plans only if: (1) it deals "with the subject matters covered by ERISA — reporting, disclosure, fiduciary responsibility, and the like;" (2) it affects the content or administration of ERISA-covered employee benefit plans in a manner that offends the language or purposes of ERISA;[11] or (3) it conflicts with other provisions of ERISA, such as its exclusive enforcement scheme. *Shaw v. Delta Air Lines, Inc.*, *supra*, 463 U.S. at 98. Under this more precise definition, the Equity Amendment Act would not "relate to" ERISA-covered plans within the meaning of section 514(a) because it sets workers' compensation benefits based on the level of benefits provided in ERISA-covered plans to active workers. Furthermore, this result is consistent with the results and holdings of this Court's ERISA preemption cases. This Court

[11] The qualification — "in a manner that offends the language or purposes of ERISA" — is necessary to prevent employers from adding provisions to their ERISA-covered plans in order to exempt themselves from valid state laws. As the Eighth Circuit has stated "if negation of a plan provision was the standard for ERISA preemption, parties could avoid any state law by including a contrary provision in an ERISA plan." *Arkansas Blue Cross & Blue Shield v. St. Mary's Hosp., Inc.*, 947 F.2d 1341, 1345 (8th Cir. 1991), *cert. denied*, No. 91-1631 (June 1, 1992).

has *never held* that a state law "relates to" ERISA-covered plans and is thus preempted because employee benefits that a state may otherwise validly require are set by reference to benefits provided in ERISA-covered plans.

B. This Court's Previous Analysis.

1. *Preemption Principles.* This Court has made clear that, even in ERISA cases, "the exercise of federal supremacy is not lightly to be presumed" and that "[p]re-emption of state law by federal statute or regulation is not favored in the absence of persuasive reasons — either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained." *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 522 (1981) (internal quotation marks omitted). In addition, it has ruled that courts "must presume that Congress did not intend to pre-empt areas of traditional state regulation." *Metropolitan Life Insurance Co. v. Massachusetts*, *supra*, 471 U.S. at 740. *Accord FMC Corp. v. Holliday*, 111 S. Ct. 403, 410 (1990) (there is a "presumption that Congress does not intend to pre-empt areas of traditional state regulation"). Preemption of state laws by ERISA must thus be measured against the scope of the federal concern in ERISA and the clarity of Congress' intent to displace state law. More precisely, as this Court stated in *Massachusetts v. Morash*, 490 U.S. 107 (1989), " 'in expounding' " ERISA, it is " 'not . . . guided by a single sentence or member of a sentence, but look[s] to the provisions of the whole law, and to its object and policy.' " *Id.* at 115, quoting *Pilot Life Insurance Co. v. Dedeaux*, 481 U.S. 41, 51 (1987).

2. *ERISA's Object and Policy.* "ERISA was passed by Congress in 1974 to safeguard employees from the abuse and mismanagement of funds that had been accumulated to finance various types of employee benefits." *Massachusetts v. Morash*, *supra*, 490 U.S. at 112. It was also passed to ensure that employers made good on their promises of

employee benefits. *Pilot Life Insurance Co. v. Dedeaux*, *supra*, 481 U.S. at 52-55. To achieve these goals, Congress imposed on designated employee benefit plans federal standards governing matters such as reporting, disclosure, and fiduciary responsibility, and it created a comprehensive enforcement scheme. In addition, in "a careful balancing of the need for prompt and fair claims settlement procedures against the public interest in encouraging the formation of employee benefit plans," Congress relieved employers of potentially conflicting and inconsistent state regulation of ERISA-covered employee benefit plans by preempting, with certain exceptions, state laws relating to such plans. *Ingersoll-Rand Co. v. McClendon*, 111 S. Ct. 478, 485 (1990), quoting *Pilot Life Insurance Co. v. Dedeaux*, *supra*, 481 U.S. at 54.

3. *Shaw and "Relate To."* In *Shaw*, this Court stated that, "in the normal sense of the phrase," the concept "relates to" means having "a connection with or reference to such a plan." 463 U.S. at 97. In *Shaw*, this Court also stated: "Some state actions may affect [ERISA-covered] employee benefit plans in too tenuous, remote, or peripheral a manner to warrant a finding that the law 'relates to' the plan." *Id.* at 100 n.21. Given the facts of *Shaw*, however, this Court "express[ed] no views about where it would be appropriate to draw the line." *Id.*

Although declining to draw a definitive line, this Court in *Shaw* rejected arguments that section 514(a)'s preemption language should be interpreted "to pre-empt *only* state laws specifically designed to affect employee benefit plans" governed by ERISA *or* "*only* state laws dealing with the subject matters covered by ERISA . . .." *Id.* at 98 (emphasis added). It based these determinations primarily on the modification of the language originally contained in what became section 514(a) and on other legislative history.

As this Court observed in *Shaw*, Congress did alter the language originally proposed for ERISA's preemption provision:

> The bill that became ERISA originally contained a limited pre-emption clause, applicable only to state laws relating to the specific subjects covered by ERISA. The Conference Committee rejected these provisions in favor of the present language, and indicated that the section's pre-emptive scope was as broad as its language.

Id. (footnote omitted). Furthermore, as this Court also observed in *Shaw*, the bill's sponsors in both the House and the Senate suggested an interpretation of the preemption provision broader than that limited to the specific subjects regulated by ERISA. Representative Dent, for example, spoke of " 'the reservation to Federal authority [of] the sole power to regulate the field of employee benefit plans,' " but, as this Court noted, he followed this description by stating: " 'With the preemption of the field, we round out the protection afforded participants by eliminating the threat of conflicting and inconsistent State and local regulation.' " *Id.* at 99, quoting 120 Cong. Rec. 29197 (1974).[12] Similarly, this Court quoted Senator Williams as follows:

> "It should be stressed that with the narrow exceptions specified in the bill, *the substantive and enforcement provisions* of the conference substitute *are intended to preempt the field for Federal regulations, thus eliminating the threat of conflicting or inconsistent State and local regulation of employee benefit plans.*"

Id. at 99, quoting 120 Cong. Rec. 29933 (1974) (emphasis added).

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[12] Certainly, Representative Dent could not have meant to describe the ERISA preemption provision by what he said in the first sentence quoted above, in view of the fact that Congress expressly preserved to the States the power to regulate employee benefit plans pursuant to the laws referenced in section 4(b)(3).

4. *Reexamination of Shaw's Sources in Light of the Decision Below.* When the sources of *Shaw* are reexamined in light of the decision below, they support a definition of "relate to" narrower than the wooden and overbroad definition adopted by the court below and broader than the two too-narrow alternatives this Court properly rejected in *Shaw*. As noted, this Court in *Shaw* rejected arguments that section 514(a)'s preemption language should be interpreted "to pre-empt *only* state laws specifically designed to affect employee benefit plans" governed by ERISA *or* "*only* state laws dealing with the subject matters covered by ERISA . . .. *Shaw v. Delta Air Lines, Inc., supra*, 463 U.S. at 98 (emphasis added). Under the District's proposed definition, however, ERISA's preemptive scope would be broader than the alternatives rejected by this Court in *Shaw*. Thus, a state law would "relate to" ERISA-covered plans not only if it deals with "the subject matters covered by ERISA," but also if it affects the content or administration of ERISA-covered employee benefit plans in a manner that offends the language or purposes of ERISA or if it conflicts with other provisions of ERISA, such as its exclusive enforcement scheme. This middle ground protects the federal concerns that prompted ERISA regulation of employee benefit plans; eliminates the threat of inconsistent non-federal regulation of ERISA-covered plans; preserves the exclusivity of ERISA's comprehensive enforcement scheme; and strikes a proper balance between those considerations and Congress' plain purpose not to displace unnecessarily traditional and legitimate exercises of state power and authority.

Neither the alteration of the language of the preemption provision nor the other legislative history supports the definition of "relate to" adopted by the court below. The modification of the language of the preemption provision tells us only that Congress intended federal preemption to extend beyond state laws "relating to the specific subjects covered by ERISA," such as disclosure and reporting. *Id.* at 98. This

modification does not, however, definitively indicate what Congress intended to preempt in addition to such state laws.[13]

Furthermore, the statements of the bill's sponsors, which speak of federal regulation of employee benefit plans, of how "the substantive and enforcement provisions" of ERISA "are intended to preempt the field," and of the need to eliminate "conflicting or inconsistent State and local regulation of employee benefit plans," do not permit the conclusion that Congress "unmistakably . . . ordained" preemption of any and all state laws, unless expressly exempted from preemption, that have some reference to or connection with ERISA-covered employee benefit plans. *Alessi v. Raybestos-Manhattan, Inc., supra*, 451 U.S. at 552.

To ascertain the meaning of "relate to any employee benefit plan" covered by ERISA, this language must be read in the context of the federal regulation imposed on designated employee benefit plans, of Congress' stated purpose to eliminate "inconsistent State and local regulation of employee benefit plans" covered by ERISA, and ERISA's comprehensive enforcement scheme. When this language is read in this way, it cannot be said, as the court below ruled, that the Equity Amendment Act "relates to" ERISA-

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[13] The original preemption language in the House and Senate bills was set forth by the Court in *Shaw*. The House bill "provided that ERISA would supersede state laws 'relat[ing] to the reporting and disclosure responsibilities, and fiduciary responsibilities, of persons acting on behalf of any employee benefit plan . . ..' " 463 U.S. 98 n.18, quoting H.R. 2, 93d Cong., 2d Sess., § 514(a) (1974) (brackets supplied by Court). The bill that initially passed the Senate "provided for pre-emption of state laws 'relat[ing] to the subject matters regulated by this Act or the Welfare and Pensions Plans Disclosure Act.' " *Id.*, quoting H.R. 2, 93d Cong., 2d Sess., § 699(a) (1974) (brackets supplied by Court).

Both bills, therefore, contained very narrow preemptive language. This language would not have preempted all state laws that conflicted with ERISA's objects and purposes, as does the District's proposed test.

covered employee benefit plans simply because the workers' compensation benefits it requires are set by reference to benefits provided in such plans.

The manner in which the Act sets workers' compensation benefits does not impose on ERISA-covered plans any of the requirements mandated by ERISA itself; it does not require employers to alter their ERISA-covered plans, as this Court prohibited in *Shaw*; and it does not regulate, or provide an enforcement mechanism for, any aspect of such plans. Employers remain free to alter and administer their voluntary plans in any way they deem fit consistent with ERISA itself. Accordingly, the manner in which the Equity Amendment Act establishes workers' compensation benefits, does not implicate any of ERISA's federal concerns and thus does not "relate to" ERISA-covered plans.

C. A Definition Of "Relate To" Narrower Than That Adopted By The Court Below Is More Consistent With This Court's Holdings In Its ERISA Cases.

The definition of "relate to" advanced here is more consistent with this Court's other ERISA jurisprudence than is the definition adopted by the court below. It would permit a finding of "relate to" whenever a state law dealt with the subject matters regulated by ERISA, affected the content or administration of ERISA-covered plans in a manner that offends the language or purposes of ERISA, or conflicts with other provisions of ERISA, such as its exclusive enforcement scheme. It would not permit a finding of "relate to" because a state law referred to benefits provided by ERISA-covered plans in establishing eligibility for benefits that a state may properly require, or in setting the level of benefits to be paid under the state law.

In *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1 (1987), for example, this Court held not preempted a state statute requiring employers to provide one-time severance payments to employees in the event of a plant closing. It did so even

though the statute expressly exempted employers who had established ERISA-covered employee benefit plans that included severance pay[14] and even though the statute could have an impact on employer decisions to provide severance pay.[15] *Fort Halifax* therefore supports the proposition that a state law which establishes eligibility for employee benefits by reference to benefits in ERISA-covered plans is not necessarily "related to" ERISA-covered plans or preempted.

This Court's decision in *Mackey v. Lanier Collection Agency & Service, Inc.*, 468 U.S. 825 (1988), is not to the contrary. In *Mackey*, this Court held that ERISA preempted on two grounds an express exception from a general state garnishment statute for ERISA-covered employee welfare benefit plans. One ground was that the exception "related to" ERISA-covered plans. The exception not only expressly referred to such plans, but also singled out these plans for special treatment. By contrast, the Equity Amendment Act applies to District *employers* and it requires payment of insurance benefits for injured workers by all employers who provide such benefits to active workers, including employers whose plans for active workers are *exempt from ERISA*.[16]

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[14] This Court previously had affirmed decisions holding that even an employee benefit plan that pays severance benefits out of general assets is an ERISA-covered plan. See *Holland v. Burlington Industries, Inc.*, 772 F.2d 1140 (4th Cir. 1985), *summarily aff'd sub nom., Brooks v. Burlington Industries, Inc.*, 477 U.S. 901 (1986); *Gilbert v. Burlington Industries, Inc.*, 765 F.2d 320 (2d Cir. 1985), *summarily aff'd sub nom., Roberts v. Burlington Industries, Inc.*, 477 U.S. 901 (1986).

[15] The state law may have provided an incentive to employers to include in their ERISA-covered plans severance benefits, albeit benefits inferior to those required by state law, in order to avoid paying the benefits that would otherwise be required by state law.

[16] Although this aspect of *Mackey* is distinguishable from this case, the District believes that it may be erroneous and that the statutory exception in *Mackey* did not "relate to" ERISA-covered plans simply because it expressly singled out such plans for special treatment. One

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The definition of "relate to" proposed by the District would not, moreover, render valid any other state law previously found by this Court to be preempted, whether the state law is of a type referenced in sections 4(b)(3) or 514(b) of ERISA, or one not singled out for special treatment by ERISA. In the case of *Shaw*, ERISA would still preclude states from requiring employers to alter their ERISA-covered plans to provide the benefits mandated by state law.[17] Nor would the result in *Alessi v. Raybestos-Manhattan, Inc.*, *supra*, be different. *Alessi* involved a state workers' compensation statute forbidding employers from integrating employee benefits payable pursuant to ERISA-covered pension plans with employee benefits payable pursuant to workers' compensation laws. That state statute precluded ERISA-covered employee benefits plans from calculating the benefits payable by the plans in the manner specified in the

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way of illustrating this point is to assume a state garnishment statute which expressly lists the types of funds subject to garnishment, and includes ERISA-covered employee welfare benefit plans, but excludes other types of funds. The District does not believe that this Court would have held the provision referencing ERISA-covered plans preempted and thus have freed such plans from the statute. As a consequence, the District believes that a sufficient "relationship to" ERISA-covered plans would be established only when one also takes into account the structure of ERISA. As this Court observed in *Mackey*, the structure of ERISA demonstrates a congressional intent not to exempt employee welfare plans from state garnishment statutes. 486 U.S. at 831-38. In contrast to the exception in *Mackey*, which conflicted with ERISA's purpose to permit garnishment of benefits plans, the District, as the court below acknowledged, may require employers to provide health insurance benefits as part of its workers' compensation law without conflicting with ERISA.

[17] See also *Stone & Webster Eng'g Corp. v. Ilsley*, 690 F.2d 323 (2d Cir. 1982), *aff'd mem. sub nom., Arcudi v. Stone & Webster Eng'g Corp.*, 463 U.S. 1220 (1983) (holding preempted a state workers' compensation law that required employers to alter their ERISA-covered multibenefit plans to provide health insurance to injured workers).

plans, and thus plainly "related to" ERISA-covered plans even under the District's proposed definition.[18]

In the case of state insurance laws, this Court has issued two decisions, *Metropolitan Life Insurance Co. v. Massachusetts*, *supra*, and *FMC Corp. v. Holliday*, *supra*, ruling that the laws in question related to ERISA-covered employee benefit plans. The first case concerned a state insurance statute which required specified benefits to be included in general health insurance policies sold to state residents, and the second, a statute which prohibited insurers from exercising subrogation rights against their insureds who recovered damages in tort actions. Both statutes, insofar as they applied to ERISA-covered employee benefit plans, would "relate to" such plans even under the District's proposed definition. Both would affect the benefits that must be provided by such plans, the first directly and the second indirectly.[19]

Finally, the results of this Court's decisions not involving statutes singled out for special treatment by ERISA would not be changed by tailoring the definition of "relate

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[18] In addition, of course, the state statute conflicted with federal law permitting integration of such benefits and would be invalid for that reason alone.

[19] However, as *Metropolitan Life Insurance Co.* and *FMC Corp.* make clear, state insurance laws are not preempted simply because they relate to ERISA-covered employee benefit plans. Section 514(b)(2)(A), 29 U.S.C. § 1144(b)(2)(A), saves state insurance laws from preemption, subject to section 514(b)(2)(B)'s "deemer" clause, 29 U.S.C. § 514(b)(2)(B). The deemer clause provides that employee benefit plans may not be deemed to be insurers, a clause that requires an additional inquiry in the case of general state insurance laws — whether the employer with an employee benefit plan is self-insured or not. An employer who purchases insurance for its plan may properly be indirectly subject to an insurance law which governs the insurance company from which it purchases insurance. An employer, who self-insures, however, is not subject to the law because, under ERISA's deemer clause, its plan may not be deemed an insurer. *See FMC Corp. v. Holliday*, *supra*, 111 S. Ct. at 409-10; *Metropolitan Life Insurance Co. v. Massachusetts*, *supra*, 471 U.S. at 735 n.14, 747.

to" to conform more closely to the structure, purposes, and other provisions of ERISA. Thus, in *Pilot Life Insurance Co. v. Dedeaux*, *supra*, this Court ruled preempted state common law causes of action asserting improper processing of claims for benefits under an ERISA-covered employee benefit plan. In *Ingersoll-Rand Co. v. McClendon*, *supra*, this Court ruled that ERISA preempts state common law claims for wrongful discharge effected by an employer in order to prevent its employees from becoming vested under an ERISA-covered pension benefit plan. Such supplemental state common law causes of action conflict with ERISA's exclusive civil enforcement scheme governing ERISA plans and thus may be said to "relate to" such plans.[20]

CONCLUSION

The court below erred in two important respects. First, it erroneously failed to follow the two-step approach mandated by *Shaw* for determining whether a section 4(b)(3) law, such as a workers' compensation law, is preempted by ERISA. Under *Shaw*, such a law is not preempted, even if it "relates to" ERISA-covered plans, so long as it requires or permits employers to establish a plan solely for the purpose of complying with it. Second, the Court below erroneously defined "relate to" too broadly in light of the presumption against preemption of state laws, especially those governing areas of traditional state regulation; the language, structure, and purposes of ERISA; and the legislative history. This Court

[20] The result in *Standard Oil Co. v. Agsalud*, 633 F.2d 760 (9th Cir. 1980), *aff'd mem.*, 454 U.S. 801 (1981), would also be unchanged, as would the results in the *Holland* and *Gilbert* cases cited *supra* at 33 n. 14. *Standard Oil* involved a state law requiring employers to provide their employees with a comprehensive health-care plan and thus directly regulated ERISA-covered employee welfare benefit plans. *Holland* and *Gilbert*, in turn, both ruled that employees must use ERISA's enforcement mechanism in seeking severance benefits provided by ERISA-covered plans and may not seek relief pursuant to state common law causes of action.

has never adopted such a broad definition of "relate to" and, as its decisions indicate, such a broad interpretation is not needed to protect the federal interests addressed by ERISA. What the interpretation of the court below does, therefore, is to deprive employees of state protections to which they are legitimately entitled even with ERISA and to preclude the States and the District from enacting legislation to promote their wholly legitimate local interests.

This Court should reverse the decision of the District of Columbia Circuit.

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(12)

CASE NO. 91-1326

In The
Supreme Court of the United States
October Term, 1992

THE DISTRICT OF COLUMBIA
And
SHARON PRATT KELLY, MAYOR,
Petitioners,

v.

THE GREATER WASHINGTON BOARD OF TRADE,
Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The District Of Columbia Circuit

BRIEF OF RESPONDENT

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QUESTIONS PRESENTED FOR REVIEW

Does the Employee Retirement Income Security Act of 1974 ("ERISA") preempt all state laws which relate to a *covered* ERISA plan? In particular, if a workers' compensation law requires an employer to provide an *exempt* ERISA plan, but the law ties the *exempt* ERISA plan's benefit level to the benefit level of a *covered* ERISA plan, is the workers' compensation law preempted? Thus, did the Court of Appeals in the decision below correctly hold that while a workers' compensation law can generally require specified medical benefits for injured workers, where the specified medical benefits are triggered by and tied to the employers' health insurance benefits (health insurance being a *covered* ERISA plan), the law is preempted by ERISA?

Petitioners and Amici also raise for the first time in this appeal the argument that the workers' compensation law does not "relate to" a covered ERISA plan when it requires benefits which are tied to and thus equal to the covered ERISA plan. This argument raises the question whether this issue was waived because it was not raised below or in the petition for writ of certiorari, and indeed, the Petitioners below conceded that the District of Columbia workers' compensation law relates to a covered ERISA plan?

Moreover, even if the argument was not waived, the question then is whether precedents of this Court, as well as the plain meaning of the term "relates to," make clear that a law explicitly requiring benefits triggered by, and based on, a covered ERISA plan, relates to such a plan?

LIST OF PARTIES

Pursuant to Rule 29.1 of the Rules of the Supreme Court of the United States, Respondent states that it is a non-profit corporation which pursues the interests of the business community in the greater Washington, D.C. area.

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES – Continued

CASE NO. 91-1326

In The

Supreme Court of the United States

October Term, 1992

THE DISTRICT OF COLUMBIA
And
SHARON PRATT KELLY, MAYOR,

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v.

THE GREATER WASHINGTON BOARD OF TRADE,

Respondent.

BRIEF OF RESPONDENT

The Respondent, The Greater Washington Board of Trade, by its counsel, respectfully submits this response brief in support of the decision below of the United States Court of Appeals For The District of Columbia Circuit.

STATEMENT OF THE CASE

The Respondent disagrees with Petitioners' statement of the case in several important aspects. The Petitioners attempt to avoid the ERISA statutory provisions and Petitioners confuse three ERISA terms of art: (1) an employee benefit plan, (2) a *covered* employee benefit plan and (3) an *exempt*

employee benefit plan. The Petitioners also miscite and omit several important aspects of the case.

The key ERISA provision in this case is section 514(a). 29 U.S.C. § 1144(a). In pertinent part, section 514(a) is as simple as it is clear. Any state law which "relates to" an employee benefit plan defined in section 4(a) [section 1003(a) in U.S.C., referred to as a *covered* ERISA plan], as opposed to those employee benefit plans defined in section 4(b) [section 1003(b) in U.S.C., referred to as an *exempt* plan], is preempted:

> Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title. This section shall take effect on January 1, 1975.

29 U.S.C. § 1144(a).

In section 514(b) of ERISA, certain state laws, *e.g.* insurance laws, were saved from this preemption provision, but of critical import, workers' compensation laws were not included in this saving clause:

> Except as provided in subparagraph (B), nothing in this subchapter shall be construed to exempt or relieve any person from any law of any State which regulates insurance, banking, or securities.

29 U.S.C. § 1144(b)(2)(A).

Totally separate from the preemption provision, in the beginning of the statute, in section 4, ERISA

sets forth those types of health and welfare plans which are covered by ERISA, and thus must comply with ERISA's substantive provisions: reporting and disclosure requirements (part 1), participation and vesting mandates (part 2), funding criteria (part 3) and fiduciary responsibility (part 4).[1] Section 4(a) sets forth a broad definition of *covered* health and welfare plans, 29 U.S.C. § 1003(a), and section 4(b) narrowly defines certain plans which are *exempt* from ERISA coverage and thus do not have to meet the ERISA reporting and fiduciary requirements, including plans maintained solely to comply with workers' compensation laws:

> (b) The provisions of this subchapter shall not apply to any employee benefit plan if –
>
> * * *
>
> (3) such *plan is maintained solely for the purpose of complying with applicable workmen's compensation laws* or unemployment compensation or disability insurance laws;

29 U.S.C. § 1003(b)(3) (emphasis added). Of critical import, this provision exempts only the listed *plans* from ERISA's reporting and fiduciary requirements; it does not protect *laws* in any manner, and certainly

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[1] Part 1 is at 29 U.S.C. § 1021-1031; part 2 is at 29 U.S.C. § 1051-1061; part 3 is at 29 U.S.C. § 1081-1086; and part 4 is at 29 U.S.C. § 1101-1114 (these provisions will hereinafter be referred to as "the ERISA reporting and fiduciary requirements"). Section 514 is in part 5 which deals with enforcement and has no substantive requirements for plans.

does not exempt any *laws* from the section 514(a) preemption.[2]

This distinction between *covered* plans and *exempt* plans is needed, because ERISA in its definitional section, broadly defines the term "employee benefit plan." 29 U.S.C. § 1002(1). Virtually any benefit an employer provides its employees is an "employee benefit plan." Thus, the definition includes not only pensions and health insurance, but the definition is so broad it encompasses benefits provided to comply with workers' compensation laws, disability laws, and unemployment compensation laws. If the employer gives a benefit to its employees for virtually any reason, the system of benefits is an ERISA "employee benefit plan." The key question is whether the plan is a *covered* plan or an *exempt* plan.

This Court has adopted this terminology of exempt and covered plans. *See Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 97 n.16 (1983) ("Of course, § 514(a) pre-empts state laws only insofar as they relate to *plans covered by ERISA*."); *Mackey v. Lanier Collection Agency Service, Inc.*, 486 U.S. 825, 829 (1988) (ERISA § 514(a) pre-empts "any and all state laws insofar as they may now or hereafter relate to any employee benefit plan *covered* by the statute."); *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 523 n.20 (1981) (referring to "exempted plans"). Thus, the issue is not whether benefits are part of an

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[2] In terms of ERISA's various reporting and fiduciary requirements, the distinction between *covered* and *exempt* plans is quite logical. The States already regulate reporting and fiduciary requirements for their workers' compensation plans. *See* legislative history discussed in part I, *infra*.

ERISA "employee benefit plan." The question is whether the ERISA benefit plan is an *exempt* ERISA plan or *covered* ERISA plan. Of critical import, ERISA preempts state laws which relate to *covered* plans, but ERISA does not preempt state laws which only relate to *exempt* plans. 29 U.S.C. § 1144(a).

Three misstatements in the Petitioners' Statement of the Case also need to be corrected. First, Petitioners state that "ERISA reserves to the state the power to enact legislation governing subjects traditionally within their purview, such as legislation providing benefits to employees pursuant to workers' compensation, unemployment compensation and disability insurance laws, as well as legislation governing insurance, banking, security." Petitioners' Brief at 3. In point of fact, as noted above, ERISA only saves insurance laws, banking laws, and security laws. 29 U.S.C. § 1144(b). Workers' compensation laws (as well as unemployment compensation laws and disability laws) are *not* included in the ERISA saving clause. *Id.*[3]

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[3] Of course, as noted above, *plans* which are designed to comply with workers' compensation laws (as well as unemployment compensation laws and disability laws) are exempt from ERISA's reporting and fiduciary requirements, and thus are referred to as *exempt* plans. 29 U.S.C. § 1003(b)(3). This provision protects the *plan*, but not the *law*. *See Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 523 n.20 (1981) (emphasis added) (citations omitted) ("They reason that "if a plan which is designed to 'comply with [an] applicable workmen's compensation law' is not preempted by ERISA, then a fortiori the underlying statute with which such plan is permitted to comply equally escapes coverage." *This reasoning wreaks havoc on ERISA's plain language, which pre-empts not plans, but "State laws."* 29 U.S.C. § 1144(a). The only relevant state

(Continued on following page)

Second, the Petitioners' characterization of the Court of Appeals' discussion of the *Shaw* decision as containing an "express contradiction" (as to whether the law in *Shaw* related to a covered ERISA plan) is also inaccurate. Petitioners' Brief at 9. This Court in *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983) held that if a law relates to a *covered* plan, the law is preempted; if the law only relates to an *exempt* plan, the law is not preempted. This Court in *Shaw* had one of each type of law before it, thus one law was held preempted, and one was not. *Id.* at 97 and 106.

Similarly, contrary to the Petitioners' assertion, Petitioners' Brief at 10, the Court of Appeals in its decision below did identify the administrative burden the District of Columbia workers' compensation law will impose on the covered ERISA plan – the employee's health insurance:

> While it is certainly true that *the [District of Columbia] Equity Amendment Act* does not require employers to alter ERISA-covered plans, it *explicitly ties the benefit levels of the workers' compensation plan to those of the ERISA-covered plan*. . . . The fact that the benefits to be provided to an employee receiving workers' compensation will be equivalent to the benefit levels provided while the employee is fully employed means that *every time an employer considers changing the benefits under its ERISA-covered plan, it would have to consider the effect*

(Continued from previous page)

laws, or portions thereof, that survive this preemption provision are those relating to plans that are themselves exempted from ERISA's scope.").

> *that such a change would have on its unique obligations to its District employees receiving workers' compensation*. In light of the additional financial burden associated with an increase in ERISA health benefits, an employer might choose to forego such an increase altogether. This could have a substantial effect on the administration of an ERISA-covered plan.

Cert. Pet. App. at 17a-18a (footnote omitted) (emphasis added). The Court of Appeals also noted, moreover, that an administrative burden is not required for preemption to apply. Cert. Pet. App. at 18a.

Petitioners in their brief state that workers' compensation laws "typically" set their benefit levels based on fringe benefits workers receive, including health insurance. Petitioners' Brief at 2-3. In point of fact, only Connecticut and the District of Columbia have an "equivalent" benefit requirement for health insurance in their workers' compensation laws, and only six of the fifty states include health benefits in the workers' compensation average weekly wage (which is what the workers' compensation is based on). *See* AARP Brief at 6, citing 2A *Larson, Law of Workermen's Compensation* § 60.12 (1991 Cum. Suppl.).

Finally, Petitioners in their statement of the case fail to note that before the District Court and Court of Appeals, and in the Petition For Writ of Certiorari, the Petitioners conceded that the District of Columbia workers' compensation law "relates to" a covered ERISA plan. *See* part II, *infra*.

SUMMARY OF THE ARGUMENT

The District of Columbia workers' compensation law "relates to" a *covered* ERISA plan, because the new law ties its mandated workers' compensation plan benefits to the employer's health insurance plan benefit levels, and the health insurance plan is a covered ERISA plan. Section 514(a) of ERISA preempts all state laws which relate to a *covered* ERISA plan, as opposed to an *exempt* plan. Thus, by its plain terms, section 514(a) preempts the District of Columbia's workers' compensation law, to the extent it creates benefits triggered by, and based on, an employer's health insurance.

The Petitioners' and the Second Circuit *Donnelley* decision's reliance on this Court's ruling in *Shaw* is misplaced. The *Shaw* decision dealt with a state law which only related to an *exempt* ERISA plan. This Court in *Shaw* held such a law was not preempted because it only related to an exempt plan, *and* the exempt plan was not required to be part of the covered ERISA plan. In contrast, the District of Columbia law relates to a *covered* ERISA plan.

Nor does section 4(b) of ERISA somehow save the District's workers' compensation law from preemption. As this Court noted in *Alessi*, section 4(b) only saves exempt *plans* from ERISA's reporting and fiduciary requirements; section 4(b) does not save *laws*. This is clear from the wording of the statute, the legislative history, as well as the structure of the statute. ERISA has a preemption saving clause in section 514(b) which, for example, saves insurance laws from preemption. Conspicuous in its absence

from section 514(b) is any reference to workers' compensation laws.

In desperation, Petitioners and two Amici attempt to argue that the District's workers' compensation law does not relate to a covered ERISA plan, "merely" by triggering a right by, and basing the amount of the right on, the covered ERISA plan. The initial problem with this argument is that it was waived. The Petitioners not only failed to raise this issue below and in their petition for writ of certiorari, Petitioners actually conceded the reverse – agreeing that the workers' compensation law relates to a covered ERISA plan. Indeed, the second problem is that no Court, including the Second Circuit in *Donnelley*, and the District Court below, has ever held otherwise.

Moreover, this Court has previously "drawn the line" as to when a state law relates to a covered ERISA plan, and thus there is no need for further clarification. This Court has explicitly held that if a law creates rights or a cause of action based on a covered ERISA plan, then it relates to the plan. Conversely, general application statutes which encompass ERISA benefits in their remedy or application, but are not directed explicitly at a covered ERISA plan, are not preempted merely because they have a minor effect on the plan. What Petitioners and Amici want is not a clarification, but rather a rewrite of the statute.

The simple fact is that wherever the line is, the District's workers' compensation law is way over it. Any law which explicitly cites to a covered ERISA plan, which creates a right triggered by a covered

ERISA plan, and which bases the extent of the right on the benefit level of the covered ERISA plan, certainly under plain English "relates" to the covered ERISA plan. Simply put, there is not a need for clarifying where to "draw the line," and, moreover, the facts of this case do not raise the issue.

ARGUMENT

I. PETITIONERS INCORRECTLY ARGUE THAT ERISA HAS A TWO-STEP PREEMPTION TEST. THE "RELATES TO" TEST IS BY ITS TERMS AND BY THIS COURT'S PRECEDENTS SIMPLE AND CLEAR: ANY LAW WHICH RELATES TO A COVERED ERISA PLAN IS PREEMPTED. THE *SHAW* DECISION DOES NOT STATE OTHERWISE, AND SECTION 4(b) DOES NOT SAVE ANY LAWS. BY TYING THE WORKERS' COMPENSATION BENEFITS PLAN TO A COVERED ERISA PLAN (HEALTH INSURANCE), THE D.C. LAW IMPERMISSIBLY RELATES TO A COVERED ERISA PLAN AND IS PREEMPTED BY ERISA.

Petitioners' primary argument is that a state law, which requires an employer to establish an *exempt* employee benefit plan (workers' compensation benefits), is not preempted by ERISA, even if the *exempt* plan it requires relates to a *covered* employee benefit plan, provided the exempt plan is kept separate from the covered plan. Petitioners argument fails because there is absolutely nothing to support such an argument in the statute, and the argument is based on a totally inaccurate reading of this Court's

decision in *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983).

It is often forgotten that the required starting point, and often the ending point, for applying a statute is the statutory language. Section 514(a) of ERISA is incredibly simple. If a state law relates to a *covered* ERISA plan, as opposed to an *exempt* ERISA plan, it is preempted; period, end of discussion! There is no saving clause in ERISA based on keeping the *exempt* plan and *covered* plan separate. Petitioners do not even attempt to explain what in the ERISA's statutory language suggests, let alone permits, the "separate even if it relates to" exception they advocate. While admittedly this argument was started by the Second Circuit in *R.R. Donnelley & Sons Co. v. Prevost*, 915 F.2d 787 (2d Cir. 1990), *cert. denied*, 111 S.Ct. 1415 (1991), there is similarly nothing in the *Donnelley* decision which even tries to explain how section 514(a) requires, or even permits, the Petitioners' argued for two-step approach. Petitioners cannot properly ask this Court to create a two-step approach, when Congress in the statute wrote only a one step approach – "relates to."

Petitioners and the *Donnelley* Court cite, of course, to this Court's decision in *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983). With all due respect, they are turning the *Shaw* decision on its head. This Court in *Shaw* had before it, in pertinent part, a disability law which mandated a certain number of weeks of benefits. Under section 4(b) of ERISA, disability benefit plans are exempted from ERISA. Thus, the plan the law created was an exempt plan. Since the exempt plan's benefit levels were *not* tied to a covered ERISA plan, the disability law in *Shaw* did

not relate to a covered ERISA plan.[4] Thus, the holding in *Shaw* was rather straightforward: the disability law was not preempted because it did not relate to a covered ERISA plan, but rather it only related to an exempt plan:

> The Disability Benefits Law presents a different problem. Section 514(a) of ERISA pre-empts state laws that relate to benefit plans "described in section 4(a) and not exempt under section 4(b)." Consequently, while the Disability Benefits Law plainly is a state law relating to employee benefit plans, *it is not pre-empted if the plans to which it relates are exempt from ERISA under § 4(b).*

Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 106 (1983) (emphasis added).

The *Shaw* decision, in order to assure that the disability law did not relate to a covered ERISA plan, went even one step further. This Court held that if the state law required that the exempt ERISA plan even be part of the covered ERISA plan, then that required combination of the plans alone would mean the law relates to the covered ERISA plan and is preempted. However, if the state law merely gave the employer the option (but not the requirement) to combine the two plans, this option was too tenuous

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[4] Petitioners argue that the disability law in *Shaw* related to a *covered* ERISA plan. This is not accurate. The disability law related to an employee benefit plan (providing disability benefits is an employee benefit plan), but the employee benefit plan was *NOT* a *covered* plan; it was an *exempt* plan. *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 93, 106 (1983).

alone to trigger the "relates to" test. *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 108 (1983).

The Petitioners and the *Donnelley* Court have turned this *Shaw* safeguard on its head. *Shaw* held that if an exempt plan is even required to be combined with a covered plan, the law requiring the combination is preempted. The Petitioners then argue the reverse must be true – any law which requires a separate plan is not preempted no matter how much it "relates to" a covered ERISA plan. There is nothing in logic or the *Shaw* decision which would allow such an inverted result. Indeed, this Court in *Shaw* explicitly noted that the disability law in question could *not* even be enforced through regulation of a covered ERISA plan:

> We further hold that the Disability Benefits Law is not pre-empted by ERISA, although New York *may not enforce its provisions through regulation of ERISA covered benefits plans*.

Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 109 (1983) (emphasis added).

The Petitioners' and *Donnelley* Court's misreading of the *Shaw* decision was nicely explained by the Court of Appeals below:

> The [District of Columbia] Equity Amendment Act relates, in fact, to two different plans: First, the Act "relates to" an ERISA-covered plan by requiring that the new benefits be "equivalent" to those already provided under an existing covered plan and by defining the employers who are obliged to provide the new benefits as those who already provide benefits under a covered

plan. Second, by requiring new benefits to be provided to employees who have been injured on the job, the Act "relates to" a workers' compensation plan that is, by virtue of the exemption for such plans under section 4(b)(3), exempt from ERISA coverage. So, the Act relates both to an ERISA-covered plan and to a plan that is exempt from ERISA coverage.

The district court relied on *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983), for the argument that because the Act related to a plan that was exempt from ERISA coverage, it was saved from preemption.

* * *

But in our case, as we have already observed, the Equity Amendment Act relates to two plans – one that is ERISA-covered and one that is exempt from ERISA coverage. Had the Equity Amendment Act related only to the workers' compensation plan – had it, for example, made no reference to existing ERISA-covered plans and simply required all employers to provide specified minimum health benefits for employees receiving workers' compensation – it would clearly have survived preemption under the principles announced in Shaw.

The key issue in distinguishing Shaw from this case is that the Court in Shaw never found that New York Disability Benefits Law related to an ERISA-covered plan. The Court did find that the Disability Benefits Law plainly related to an "employee benefit plan," Shaw, 463 U.S. at 106, but a law is preempted under section 514(a) only if it

relates to an employee benefit plan that is not exempt. The plan to which New York Disability Benefits law related was exempt, so the law did not even qualify at the threshold for preemption.

Shaw would have governed this case had the Equity Amendment Act related only to the exempt plan; in that case, the Act would not have been preempted. *But Shaw does not tell us why an Act that relates to an ERISA-covered plan can avoid preemption simply because it also relates to a plan exempt from ERISA coverage.* Not only is there no authority in Shaw for this proposition, but it is entirely at odds with ERISA's statutory structure.

* * *

> But the Second Circuit focused on only half the story. By concentrating on how and in what ways the new workers' compensation plans would be exempt from ERISA coverage, the court failed to appreciate the fact that the Connecticut statute (like the Equity Amendment Act in this case) related to an ERISA-covered plan by tying the new benefits to existing benefits and by limiting the law's applicability to employers already providing benefits through ERISA plans.

Cert. Pet. App. 11a-15a (footnotes omitted)(emphasis added).

Petitioners also argue that since all workers' compensation laws relate to a *covered* ERISA plan, such laws must be permitted if the plan they require is separate from the *covered* ERISA plan. Petitioners' Brief at 16-17. Even if this were true, only Congress,

and not the Courts, can amend ERISA. Moreover, Petitioners' premise is simply not accurate. Not all workers' compensation laws relate to a *covered* ERISA plan. To the contrary, virtually all workers' compensation laws do not relate to a covered ERISA plan; rather, such a relationship only occurs in the rare circumstances, such as in the Connecticut and District of Columbia laws discussed herein, where the workers' compensation system ties its benefit levels to the employer's health insurance plan. If that tie is not attempted, there is no relation to a *covered* ERISA plan and hence there is no preemption. That is the whole point of the *Shaw* decision. *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 106 (1983). Indeed, the *Shaw* decision's only limitation is that, to make sure there is no tie to a *covered* ERISA plan, the law cannot even require that the *exempt* ERISA plan be part of a *covered* ERISA plan.

The Petitioners have essentially abandoned their earlier argument that section 4(b) somehow saves an exempt ERISA plan from preemption even if the plan, and the state law creating it, relate to a covered ERISA plan. Indeed, this Court eliminated such an argument in *Alessi v. Raybestos-Manhattan Inc.*, 451 U.S. 504 (1981). This Court in *Alessi* had before it a New Jersey workers' compensation law which prohibited an ERISA pension plan from taking a credit (and thus reducing the pension) by the amount of any workers' compensation payments. This Court held that the workers' compensation law was preempted because it related to an ERISA plan which covered more than workers' compensation (*i.e.*, the pension plan). Of critical import, in *Alessi* this Court was faced with exactly the argument the District Court

herein accepted: if the workers' compensation *plan* is not covered by the ERISA pursuant to section 4(b), then "a fortiori" the *law* which requires the plan is automatically not preempted under section 514(a). This Court emphatically rejected this argument, noting that section 4(b) saves *plans*, not *laws*. As this Court noted, such an interpretation "wreaks havoc on ERISA's plain language":

> Retirees in No. 79-1943, however, claim that the exception (for workers' compensation plans) should apply more generally to plans governed by state workers' compensation laws. *They reason that "if a plan which is designed to 'comply with [an] applicable workmen's compensation law' is not pre-empted by ERISA, then a fortiori the underlying statute with which such plan is permitted to comply equally escapes coverage."* Reply Brief for Appellants in No. 79-1943, p. 18. *This reasoning wreaks havoc on ERISA's plain language, which pre-empts not plans, but "State laws." 29 U.S.C. § 1144(a). The only relevant state laws, or portions thereof, that survive this preemption provision are those relating to plans that are themselves exempted from ERISA's scope.* And the relevant exemption from ERISA's coverage for plans maintained solely for compliance with state workers' compensation laws has no bearing on the plans involved here, which more broadly serve employee needs as a result of collective bargaining. As retirees do not, and cannot, claim that the plans involved here are free from ERISA's coverage, they cannot claim

> the exception to preemption restricted to laws governing such exempted plans.

Id. at 451 U.S. 523 n.20 (emphasis added).[5]

Respondent would also note that the ERISA legislative history, in the Conference Report, is clear that the section 4(b) exemption was designed to merely relieve exempt *plans*, including workers' compensation plans, from the ERISA "reporting and disclosure requirements" and "fiduciary duties" requirements, and thus does not save any *laws* from preemption:

> Plans subject to the provisions and exemptions.
>
> Under the conference substitute, the new *reporting and disclosure requirements* are to be administered by the Secretary of Labor and are to be applied to all pension and welfare plans established or maintained by an employer or employee organization engaged in, or affecting, interstate commerce. Governmental plans, certain church plans, *workmen's compensation* and unemployment compensation plans, plans maintained outside the United States for the

[5] The District Court minimized this footnote in *Alessi*, arguing it was a side comment. The fact is, however, that this Court in its *Shaw* decision favorably cites to this same *Alessi* footnote. *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 107 (1983).

Indeed, the problem with the *Donnelley* analysis can be easily seen by applying it to the facts before this Court in *Alessi*. The Second Circuit decision would allow a state to avoid the mandate of *Alessi* by requiring employers to provide a workers' compensation benefit equal to the amount by which the pension plan is reduced due to the workers' compensation credit.

> benefit of persons substantially all of whom are nonresident aliens, and so-called excess benefit plans, which provide benefits in addition to those for which deductions may be taken under the tax laws, are *exempted from the requirements*. The Secretary of Labor also is authorized to waive and modify certain of these requirements for employee benefit plans.
>
> All plans of the types subject to the *reporting and disclosure provisions* are to be required to file an annual report with the Secretary of Labor regardless of the number of participants involved. However, simplified reports may be authorized for plans with fewer than 100 participants.

H.R. Rep. 93-1280, 93d Cong., 2d Sess. 255-56 (emphasis added).

The House report contained a similar discussion, under the heading "fiduciary responsibility and disclosure:"

> TITLE I – FIDUCIARY RESPONSIBILITY AND DISCLOSURE
>
> Section 101. Coverage
>
> Title I would cover all private employee benefit plans under Commerce Clause jurisdiction except:
>
> 1. Plans of the Federal government;
>
> 2. *Plans required under workmen's compensation*, unemployment compensation, and disability insurance laws;

> 3. Plans established or maintained outside the United States for the benefit of non-United States citizens;
>
> 4. Unfunded deferred compensation schemes of top executives.

H.R. Rep. 93-533, 93d Cong., 1st Sess. 18 (emphasis added).

The Senate report also indicated the exemption was merely to relieve exempt plans from ERISA's disclosure and fiduciary requirements:

> COVERAGE AND EXEMPTIONS
>
> Section 104 – This section requires that, unless exempt, the provisions of the Act apply to any pension or profit-sharing-retirement plan established or maintained by an employer, a union, or both together in any industry or activity affecting interstate commerce. *The fiduciary and disclosure provisions of the Act apply to all employee benefit plans unless exempt.*

S. Rep. No. 93-127, 93d Cong., 1st Sess. 38 (emphasis added).

> Section 609 – This section provides that this Act supersedes state laws covering the same matters. However, the Act does not exempt or relieve any person from complying with any state law regulating insurance, banking, and related matters, and *does not remove state jurisdiction over plans not subject to the Act. State courts are not prevented from asserting jurisdiction in compelling the accounting of a fiduciary or requiring clarification of the plan.* The Secretary or a plan participant may remove such a case from the

> state to the federal court if it involves the applicability of the Act.

S. Rep. No. 93-127, 93d Cong. 1st Sess. 47-48 (emphasis added).

The legislative history is also clear that the section 4(b) exemptions are to be construed narrowly:

> It is intended that coverage under the Act be construed liberally to provide the maximum degree of protection to working men and women covered by private retirement programs. Conversely, *exemptions should be confined to their narrow purpose.*

S. Rep. 93-127, 93d Cong., 1st Sess. 18 (emphasis added).

The fact is that when Congress wanted to save state laws from preemption, it did so in section 514(b). 29 U.S.C. § 1144(b). When one recognizes this, it then becomes clear that section 4(b) is not a saving clause. If Congress wanted to save workers' compensation laws from preemption, it could have added them to the saved laws in section 514(b). While section 514(b) saves insurance laws from preemption, workers' compensation laws are *not* included in the section 514(b) saving clause. In this light, it is clear that section 4(b) is not a saving clause in terms of preemption, but rather section 4(b) merely exempts workers' compensation plans from the reporting and fiduciary requirements of ERISA.

Simply put, section 514(a), read literally, prohibits any state law from relating to a covered plan; whereas, section 4(b) relieves workers' compensation plans from the reporting and fiduciary requirements of ERISA. Thus, the District of Columbia mandated

workers' compensation *plan* is relieved from ERISA's reporting and fiduciary duty requirements. However, the *law* requiring the plan is preempted because it refers to and relies on a plan which is covered by ERISA (the employer's health insurance).

Respondent would note that it has an unexpected ally in its attempt to disclose the defects in the Petitioners' main argument. Amicus AFL-CIO, in a refreshing and much appreciated display of intellectual integrity, conceded that the *Donnelley* decision and Petitioners' primary argument are wrong:

> The syntax of ERISA § 514(a), however, makes lucid that state laws are preempted insofar as the laws "relate to" ERISA employee benefit plans not exempt from ERISA coverage under § 4(b), whether or not the state law also relate to exempt plans.

Brief of Amicus AFL-CIO at 9-10.

> Nothing in Shaw, then, insulates from ERISA's pre-emptive reach state laws that relate to both ERISA-covered employee benefit plans and benefit plans exempt from ERISA coverage under § 4(b).

Id. at 11.

> The conforming language is structurally necessary because, as this Court opined in *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 523 n.20 (1981), "ERISA's plan language . . . preempts not plans, but 'State laws.'" Section 4(b), on the other hand, exempts from ERISA coverage generally not state laws but certain plans. Id. Thus, § 4(a), which exempts § 4(b) plans from the affirmative coverage of ERISA's substantive provisions, will not, absent some explicit statement in that regard, exempts laws relating to those plans from the ERISA preemption provisions.

Id. at 9 n.5.

The simple fact is that the Second Circuit *Donnelley* decision is devoid of any statutory authority and is based on a misreading of this Court's *Shaw* decision. In contrast, the Court of Appeals' decision below relies on the plain language of section 514(a) of ERISA, as well as ERISA's legislative history.

II. THE ARGUMENT OF PETITIONERS AND TWO AMICI – THAT A LAW WHICH TIES BENEFITS TO A COVERED ERISA PLAN DOES NOT RELATE TO THE COVERED ERISA PLAN – WAS NOT RAISED BELOW OR IN THE PETITION FOR WRIT OF CERTIORARI, AND INDEED THE REVERSE WAS CONCEDED BY PETITIONERS BELOW. HENCE THE ARGUMENT WAS WAIVED. MOREOVER, UNDER THIS COURT'S PRECEDENTS, AND THE PLAIN MEANING OF THE WORDS "RELATES TO," SUCH A LAW RELATES TO A COVERED ERISA PLAN. NO COURT HAS EVER HELD OTHERWISE, AND THIS COURT SHOULD DECLINE THE PETITIONERS' INVITATION TO REWRITE THE ERISA STATUTE. WHILE THERE IS A LINE DRAWN BELOW WHICH STATE LAWS DO NOT "RELATE TO" A COVERED ERISA PLAN, THIS COURT HAS ALREADY CLEARLY DRAWN THE LINE, AND THE FACTS OF THIS CASE DO NOT RAISE ANY ISSUE REQUIRING FURTHER CLARIFICATION.

The Petitioners and two Amici argue that the District of Columbia's workers' compensation law is

not related to a covered ERISA plan, despite the fact that the law triggers liability based on the existence of a covered ERISA plan and the law ties its mandated benefit levels to the terms of the covered ERISA plan. The first problem with the Petitioners' and Amici's "relates to" argument is that it was not only *not* raised as an issue before the District Court, Court of Appeals or in the Petition For Writ of Certiorari, the Petitioners actually conceded at each stage of the litigation exactly the opposite – that the District of Columbia's workers' compensation law relates to a covered ERISA plan. Thus, the argument was not only waived, it was conceded, and thus, it is too late for Petitioners to now raise the issue. Moreover, the argument is meritless because under the plain meaning of the term "relates to," as well as under this Court's precedents, the District's workers' compensation law, by triggering liability and measuring the created rights by the covered ERISA plan (health insurance), clearly relates to that plan.

The Petitioners, throughout this litigation, have not only failed to argue that the District of Columbia workers' compensation law does not relate to a covered ERISA plan, the District of Columbia at all stages of this litigation has explicitly *conceded* that the District's workers' compensation law relates to a covered ERISA plan. The District Court's decision below was based on the Respondent's motion for a preliminary injunction [the Respondent was the Plaintiff requesting a declaratory injunction] and the Petitioners' motion to dismiss. In its memorandum of points and authorities in support of its motion to dismiss, and in opposition to the motion for a preliminary injunction, the District of Columbia explicitedly

conceded that its workers' compensation law "relates to" a covered ERISA plan:

> Plaintiffs contend, and *defendants concede*, that section 2(c) [of the District of Columbia workers' compensation law] "relates to" a covered health plan because the benefits level dictated by section 2(c) are derived from a covered plan.
>
> * * *
>
> The instant *defendants likewise have no difficulty in conceding that section 2(c) "relates to" an ERISA covered plan*, just as the *Donnelley* Court found that the Connecticut statute related to an ERISA covered plan.

District of Columbia Memorandum of Points and Authorities dated March 26, 1991 at 3 and 8 (emphasis added).

Similarly, before the Court of Appeals, the District of Columbia conceded that its law relates to a covered ERISA plan:

> Similarly, here, although the [District of Columbia] Equity Amendment Act "relates to" ERISA-covered benefit plans . . .

Ct. App. Brief of District of Columbia filed on September 6, 1991 at 19.

Likewise, in its Petition For Rehearing filed with the Court of Appeals, the Petitioners conceded the District of Columbia law "relates to" a covered ERISA plan: "Both the District's Equity Amendment Act and New York's Disability Benefits Law 'relate to' ERISA-covered plans." Ct. App. Pet. For Reh. filed

on December 16, 1991 at 2; see also at 5. (as noted above, Petitioners' statement that the New York law related to a *covered* ERISA plan is inaccurate).

Indeed, even in the District of Columbia's petition for a writ of certiorari to this Court, the District did not raise the issue of whether the District of Columbia workers' compensation law relates to a covered ERISA plan. Petition For Writ of Certiorari at i. To the contrary, the District stated (albeit incorrectly) that all workers' compensation laws relate to covered ERISA plan:

> As a consequence, such state [workers' compensation] laws necessarily will "relate to" ERISA-covered employee welfare benefit plans.

Petition For Writ of Certiorari at 13.

This Court has repeatedly and recently held that it will not consider questions not raised before the courts below, and this Court will not consider issues not raised in the petition for writ of certiorari. *Eastman Kodak Co. v. Image Technical Servs., Inc.*, No. 90-1029, ___ U.S. ___, 60 U.S.L.W. 4465 (1992); *Kamen v. Kemper Financial Services, Inc.*, ___ U.S. ___, 111 S.Ct. 1711, 1716 n.4 (1991); *Air Courier Conference of America v. American Postal Workers Union*, ___ U.S. ___, 111 S.Ct. 913, 917 (1991). This Court in *Yee v. City of Escondido*, No. 90-1947, ___ U.S. ___, 60 U.S.L.W. 4301 (1992), recently addressed the waiver issue in a situation similar to the case herein. This Court noted that it normally will not address an issue not raised in the courts below, and will not address a question not raised in the petition for writ of certiorari, especially where no court has

ever addressed the issue and thus no conflict exists among the Circuits:

> Even if the rule were prudential, we would adhere to it in this case. Because petitioners did not raise their substantive due process claim below, and because the state courts did not address it, we will not consider it here.

Id. at U.S.L.W. 4305.

> *Rule 14.1(a) accordingly creates a heavy presumption against our consideration of petitioners' claim* that the ordinance causes a regulatory taking. Petitioners have not overcome that presumption. While the regulatory taking question is no doubt important, from an institutional perspective it is not as important as the physical taking question. *The lower courts have not reached conflicting results, so far as we know, on whether similar mobile home rent control ordinances effect regulatory takings.*
>
> * * *
>
> *Prudence also dictates awaiting a case in which the issue was fully litigated below, so that we will have the benefits of developed arguments on both sides and lower court opinions squarely addressing the question.* See *Lytle v. Household Manufacturing, Inc.*, 494 U.S. 545, 552, n.3 (1990) ("Applying our analysis . . . to the facts of a particular case without the benefit of a full record or lower court determinations is not a sensible exercise of this Court's discretion"). *In fact, were we to address the issue here, we would apparently be the first court in the nation to determine whether an ordinance like this one*

> *effects a regulatory taking*. We will accordingly follow Rule 14.1(a), and consider only the question petitioners raised in seeking certiorari.

Id. at U.S.L.W. 4306 (emphasis added). For these same reasons, this Court should not consider Petitioners' "relates to" argument.

The second problem with the Petitioners' "relates to" argument is that no court has ever held, or even suggested, that the Connecticut and District of Columbia workers' compensation laws do not relate to a covered ERISA plan. To the contrary, the Second Circuit in *R.R. Donnelly & Sons Co. v. Prevost*, 915 F.2d 787 (2d Cir. 1990), *cert. denied*, 111 S.Ct. 1415 (1991), explicitly held that the workers' compensation law relates to a covered ERISA plan:

> Applying these principles here, *we have little difficulty in concluding that section 31-284b "relate[s] to" employee benefit plans within the meaning of 29 U.S.C. § 1144(a) (1988)*. Indeed, this conclusion is virtually compelled by our ruling in Stone regarding the predecessor provision, former section 31-51h. We said in Stone: We conclude . . . that section 31-51h of the General Statutes of Connecticut constitutes a forbidden state encroachment on a private employee benefit plan. Its only purpose is to add an additional statutory requirement – the cost of which is to be borne by the employer – to a private employee benefit plan. Thus, the state statute relates to an employee benefit plan as defined by ERISA and must be construed as preempted by 29 U.S.C. § 1144(A). 690 F.2d at 329.

Id. at 791-92 (emphasis added). Similarly, the District Court below found that the District of Columbia workers' compensation law relates to a covered ERISA plan. Cert. Pet. App. at 22a-23a, 25a.

Petitioners, and particularly Amicus AFL-CIO, recognize the lack of precedent supporting the "relates to" argument. Nevertheless, they argue that it is time to "draw a line" as to what is, and is not, related to a covered ERISA plan. The problem with this argument is that this Court has already addressed the issue in prior decisions, and the line has already been clearly drawn. Moreover, the law at issue in this case is patently not near the line, but rather, is without question way over the line, and thus the need to "clarify" the line is not presented by the facts of this case.

This Court, in its decisions, has clarified nicely the reach of the "relates to" test, leaving little doubt as to where the "relates to" line is drawn. First, as a way of introduction, this Court has held that the preemption test is "deliberatively expansive:"

> "[T]he question whether a certain state action is pre-empted by federal law is one of congressional intent. '"The purpose of Congress is the ultimate touchstone."' " . . . We have observed in the past that *the express pre-emption provisions of ERISA are deliberately expansive*, and designed to "establish pension plan regulation as exclusively a federal concern."

Pilot Life Insurance Co. v. Dedeaux, 481 U.S. 41, 45-46 (1987) (citations omitted) (emphasis added).

Second, this Court has held that Congress meant what it said, and said what it meant, in using the term "relates to." Thus, in *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983), this Court essentially adopted the dictionary definition of "relate":[6]

> A law "relates to" an employee benefit plan, in the normal sense of the phrase, if it has a connection with or reference to such a plan.

Shaw v. Delta Air Lines, 463 U.S. 85, 96-97 (1983). This Court rejected a narrow definition of "relates to" which requires an effect on the core ERISA requirements:

> Nor, given the legislative history, can § 514(a) be interpreted to pre-empt only state laws dealing with the subject matters covered by ERISA – reporting, disclosure, fiduciary responsibility, and the like. The bill that became ERISA originally contained a limited pre-emption clause, applicable only to state laws relating to the specific subjects covered by ERISA. The Conference Committee rejected these provisions in favor of the present language, and indicated that the section's pre-emptive scope was as broad as its language.

Id. at 98 (footnotes and citations omitted).

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[6] This Court in *Shaw* cited to Black's Law Dictionary's definition of relate:

> *See* Black's Law Dictionary 1158 (5th ed. 1979) ('Relate. To stand in some relation; to have bearing or concern; to pertain; refer; to bring into association with or connection with').

Id. at 97 n.16.

Of critical import to the case herein, this Court, in *Mackey v. Lanier Collection Agency and Service*, 486 U.S. 825 (1988), held that when a statute is explicitly keyed to covered ERISA plans, by explicitly referring to such plans, then the law is automatically preempted. That the law may have no effect on the covered ERISA plan, or even a good effect, is irrelevant. "Singling out" a covered ERISA plan for special treatment automatically triggers the "relates to" test:

> The Georgia statute at issue here expressly refers to – indeed, solely applies to – ERISA employee benefit plans. See n. 2, supra. "A law 'relates to' an employee benefit plan, in the normal sense of the phrase, if it has a connection with or reference to such a plan." *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96-97, 103 S.Ct. 2890, 2900, 77 L.Ed.2d 490 (1983) (emphasis added). *On several occasions since our decision in Shaw, we have reaffirmed this rule, concluding that state laws which make "reference to" ERISA plans are laws that "relate to" those plans within the meaning of § 514(a).*
>
> * * *
>
> The possibility that § 18-4-22.1 was enacted by the Georgia Legislature to help effectuate ERISA's underlying purposes – the view of the Georgia Court of Appeals below, see 178 Ga.App., at 467, 343 S.E.2d, at 493 – is not enough to save the state law from pre-emption provision [of § 514(a)] . . . displace[s] all state laws that fall within its sphere, even including state laws that are consistent with ERISA's substantive requirements."

* * *

> Legislative "good intentions" do not save a state law within the broad pre-emptive scope of § 514(a).

* * *

> *The state statute's express reference to ERISA plans suffices to bring it within the federal law's pre-emptive reach.*

Id. at 829-830 (emphasis added).

> [W]e also conclude that *any* state law which singles out ERISA plans, by express reference, for special treatment is pre-empted. See Part II, *supra*. It is this "singling out" that pre-empts the Georgia antigarnishment exception.

Id. at 838 n.12.

To the extent there might have been any question left as to the reach of the preemption provision, this Court resolved any doubts in *Ingersoll-Rand Co. v. McClendon*, ___ U.S. ___ , 111 S.Ct. 478 (1990). In *Ingersoll*, this Court indicated that any reliance by a state law on a covered ERISA plan makes preemption mandatory. This Court in *Ingersoll* was faced with a state wrongful termination action which was based on an allegation the employee was terminated in order to avoid ERISA benefits. The cause of action did not directly affect any condition or provision of the ERISA plan. Indeed, the statute applied to all employee benefit plans, both covered ERISA plans and exempt ERISA plans. This Court nevertheless held that since the cause of action makes "reference to" and is "premised on" the ERISA plan, it was preempted. Simply put, because there would be no

cause of action without the covered ERISA plan, preemption is required:

> In *Mackey* the statute's express reference to ERISA plans established that it was so designed; consequently, it was pre-empted. The facts here are slightly different but the principle is the same: *The Texas cause of action makes specific reference to, and indeed is premised on, the existence of a pension plan.*

* * *

> McClendon argues that the pension plan is irrelevant to the Texas cause of action because all that is at issue is the employer's improper motive to avoid its pension obligations. *The argument misses the point, which is that under the Texas court's analysis there simply is no cause of action if there is no plan.*

* * *

McClendon argues that § 514(c)(2)'s limiting language causes § 514(a) to pre-empt only those state laws that affect plan terms, conditions, or administration.

* * *

In *Mackey* the Court held that ERISA pre-empted a Georgia garnishment statute that *excluded* from garnishment ERISA plan benefits. *Mackey*, *supra*, 486 U.S., at 828, and n. 2, 829, 108 S.Ct., at 2184, and n. 2, 2185. *Such a law clearly did not regulate the terms or conditions of ERISA-covered plans,*

and yet we found pre-emption. Mackey demonstrates that § 514(a) cannot be read so restrictively.

Id. at 483-84 (emphasis added).

On the other side of the line, this Court has noted that for general application statutes, which do not explicitly refer to or cite to a covered ERISA plan, merely having an indirect and very minor affect on a covered ERISA plan, might be too "tenuous, remote or peripheral" to constitute a "relates to." *Shaw v. Delta Air Lines Inc.*, 463 U.S. 85, 100 n.21 (1983). Thus, in *Mackey v. Lanier Collections Agency & Service*, 486 U.S. 825 (1985), this Court held that general application garnishment laws, which make no reference to the covered ERISA plan and do not create a cause of action based on the covered ERISA plan, do not relate to the ERISA plan merely because there is a minor indirect effect.

Thus, the test is simple. If a state law explicitly creates a right or creates a cause of action based on a covered ERISA plan, it relates to the plan and is thus preempted. States cannot single out covered ERISA plans for special treatment, and thus all laws which explicitly refer to covered ERISA plans are preempted. Conversely, if the cause of action or right which the law creates is not explicitly triggered by the covered ERISA plan, but rather the law is a general application law, and the statute has no material effect on the plan, then a tenuous, remote or peripheral effect alone will not cause preemption.

To use two of the Amici's examples, a tort remedy and a wrongful discharge remedy will not relate to a covered ERISA plan merely because the remedy they

provide includes all compensatory damages, including those from a covered ERISA plan. Such laws are general application rights which do not specifically deal with or cite to a covered ERISA plan, and their effect on the plan is tenuous, remote or peripheral.[7]

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[7] AARP refers to six state laws which explicitly include health benefits in a workers' average weekly wage in order to calculate disability benefits. Explicitly including the cost of health insurance (which is a covered ERISA plan) in a workers' compensation average weekly wage is probably preempted because it singles out the covered ERISA plan for special treatment, and uses it to create a cause of action/right, *i.e.* workers' compensation benefits. While it does not have the continued administrative burden of the District's required "equivalent" plan, and instead is a one time cost calculation, the fact remains that the law singles out ERISA plans. If the average weekly wage, however, included all lost benefits and did not single out the covered ERISA plan benefits, then the preemption question would be tougher. Whether such an economic cost to the employer is merely "tenuous, remote and peripheral" would have to be examined. Workers' compensation is unlike a tort remedy, because for a tort remedy a third party, not the employer, pays the remedy. Similarly, it is arguably unlike a wrongful discharge remedy because it occurs much more frequently, with more certainty, and is a major business cost.

Amicus AARP argues that the state must be allowed a complete workers' compensation remedy. The fact is, however, most states disagree. Thus, forty-four of the fifty states do not include the cost of health benefits in the average weekly wage figure. Indeed, while AARP cites *Larson* as identifying the six states, *Larson* criticizes the six states which include fringe benefits in the average weekly wage. 2A *Larson, Law of Workmen's Compensation*, § 60.12(b) at 10-635. Similarly, this Court in 1983 held the federal Longshore and Harbor Workers' Compensation Act did not include health benefits in its average weekly wage, *Morrison-Knudsen Constr. Co. v. Director*, 461 U.S. 624 (1983), and Congress did not change this result when it substantially amended the Longshore Act in 1984. To the contrary, Congress amended section 2(13) of the Longshore Act, 33

(Continued on following page)

Indeed, the fact that the Petitioners and Amici use the hypotheticals of tort remedies, wrongful discharge, and workers' compensation average weekly wage brings up an important point. The issue of where to draw the line is simply not before this Court based on the facts of this case. With all due respect to the Petitioners and Amici, wherever the line is, the District of Columbia workers' compensation law is clearly way over it. It defies the English language to say that a law, which specifically cites to a covered ERISA plan, which creates a cause of action based on a covered ERISA plan, and indeed gauges that liability solely on the covered ERISA plan, does not relate to the covered ERISA plan.

The fact is, under the District's workers' compensation law, every time the employer creates or changes its covered ERISA plan, it will know that it is effectively creating an additional right and cost under the "equivalent" plan, as well as an added administrative burden, because what happens to the covered ERISA plan must happen to the required workers' compensation equivalent. The potential for

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(Continued from previous page)

U.S.C. § 902(13), to make absolutely clear that the average weekly wage did not include fringe benefits. Pub. L. No. 98-426, 98th Cong., 2d Sess., 98 STAT. 1639 (1984). This Court has long recognized that workers' compensation is a compromise system which does not give a complete remedy, but rather is a trade-off. *Potomac Electric Power Co. v. Director*, 449 U.S. 268 (1980). Indeed, fundamental in Amici's attempt to rewrite the ERISA "relates to" language is the premise that workers' compensation is more important than ERISA, and thus must prevail in any conflict between the two. This assumption is incorrect. If Congress had wanted this result, it could have included workers' compensation in the section 514(b) exclusion of preemption, like it did for insurance. Congress did not do so.

abuse by the states would be tremendous. For example:

a. The workers' compensation law could require that its plan had to have the same administrator as the ERISA plan, and the administrator had to be bonded for all work he performed for all plans. Indeed, the workers' compensation law could also provide that the workers' compensation plan *and* any other plan administered by the same administrator had to be fully funded. Thus, through the workers' compensation law, a state could effectively require full funding for all ERISA plans.

b. The workers' compensation law could require that every time the covered ERISA plan decreased benefit levels, the workers' compensation plan would have to increase its benefit levels by a like amount. Thus, the covered ERISA plan would have a disincentive to lowering its benefit levels.

c. The workers' compensation law could provide that if the covered ERISA plan did not cover chiropractic care, then the workers' compensation plan would have to cover chiropractic care. The ERISA plan would be inhibited from excluding chiropractic care, and indeed, as a practical matter, could not do so.

d. The workers' compensation law could require that the "equivalent" benefit be insured. Thus, for self-insurers who voluntarily covered health benefits for injured workers, the law would be requiring them to insure benefits which previously were self-insured.

Indeed, if one looks at Petitioners' and Amici's briefs, it is clear that they are not really arguing that the workers' compensation law does not relate to a

covered ERISA plan based on the plain meaning of the term "relates to." Rather, the Petitioners and Amici AFL-CIO are really asking this Court to rewrite the ERISA statute. In place of "relates to," the Petitioners and Amici respectively request the following statutory language:

> [A state law is preempted if] (1) it deals "with the subject matters covered by ERISA – reporting, disclosure, fiduciary responsibility, and the like;" (2) it affects the content or administration of ERISA-covered employee benefit plans in a manner that offends the language or purposes of ERISA; or (3) it conflicts with other provisions of ERISA, such as its exclusive enforcement scheme.

Petitioners' Brief at 26 (footnote omitted).

> [State laws are preempted if they] either are specifically designed to affect ERISA-covered employee benefit plans particularly or that, while not so designed, in fact have a substantial and unavoidable impact upon the operation of such plans.

Brief of AFL-CIO at 4.[8]

Whatever the merits of these proposals, they must be addressed to Congress, and not this Court. The fact is that Congress did not enact a "substantial affect on" or a "relates to core provision" standard for preemption. Indeed, this Court in *Shaw* and *Ingersoll* explicitly rejected such attempts to rewrite the

[8] Amici AARP also discusses the interaction between different plans. AARP Brief at 13 and 13 n.13. However, section 514(a) preempts laws, not plans.

ERISA preemption test. There is no need to revisit the issue in this case.[9]

CONCLUSION

The decision of the United States Court of Appeals for the District of Columbia Circuit should be affirmed.

Respectfully submitted,

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Dated: July 7, 1992

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[9] The American Optometric Association filed an amicus curiae brief dealing with the free choice of physician. That issue is not involved in this case. Oklahoma filed an amicus curiae brief dealing with ERISA plans being used as a substitute for workers' compensation insurance. Respondent does not believe this case will have any effect on that issue. In *Shaw*, this Court held that using an ERISA plan as a voluntary option does not by itself constitute a "relates to." Connecticut and Massachusetts in their amicus curiae brief merely repeat petitioners' arguments. For these reasons, Respondent does not address those briefs herein.

No. 91-1326

In the Supreme Court of the United States

OCTOBER TERM, 1992

THE DISTRICT OF COLUMBIA
AND SHARON PRATT KELLY, MAYOR,
Petitioners,

v.

THE GREATER WASHINGTON BOARD OF TRADE,
Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the District of Columbia Circuit

REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES (continued)

In the Supreme Court of the United States

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REPLY BRIEF[1]

INTRODUCTION

Throughout this litigation, the District of Columbia has taken the position that its Equity Amendment Act is no different for ERISA purposes from the Disability Benefits Law that withstood an ERISA preemption attack in *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983). The District had interpreted *Shaw* as mandating a two-step approach to ERISA preemption for state laws governing matters such as employee disability benefits and workers' compensation:

[1] Other briefs filed in this case are cited as follows: Brief for Petitioners (D.C. Br.); Brief for Respondent (Board of Trade Br.); Brief of the American Association of Retired Persons (AARP Br.); Brief of the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO Br.); Brief of the State of Oklahoma, *et al.* (Okla. Br.); Brief for the United States (U.S. Br.); Brief of the Chamber of Commerce of the United States (Chamber of Commerce Br.); Brief of the District of Columbia Insurance Federation, *et al.* (Ins. Br.); and Brief of the Connecticut Business and Industry Association (CBIA Br.).

(1) whether the state law "relates to" ERISA-covered plans, and (2) if so, whether an employer can meet its state-law obligations by establishing an employee benefit plan separate from its ERISA-covered plan. The District had also taken this Court at its word — *Shaw* is a case in which this Court "held that . . . the State's Disability Benefits Law 'relate[d]' to welfare plans governed by ERISA," but nevertheless found it not preempted because employers could satisfy the state law by establishing a plan separate from their ERISA-covered plans. *Metropolitan Life Insurance Co. v. Massachusetts*, 471 U.S. 724, 739 (1985).

Despite *Shaw* and *Metropolitan Life*, the court below ruled that the Disability Benefits Law in *Shaw* did not relate to ERISA-covered plans; that the District's Equity Amendment Act does relate to such plans; and that, as a consequence, *Shaw* does not require a ruling that the Equity Amendment Act is outside the scope of the ERISA preemption provision.

The issue the District presented in its Petition for a Writ of Certiorari is whether the Equity Amendment Act is different for ERISA purposes from the Disability Benefits Law in *Shaw*. Cert. Pet. i. It has urged that the Act is not, on two alternative grounds.

First, the District has urged, based on *Shaw* and *Metropolitan Life*, that, because of the breadth of the definition of employee welfare benefit plan contained in ERISA, disability benefit laws and workers' compensation laws will always relate to ERISA-covered plans, but that they are nevertheless not preempted by ERISA so long as an employer can comply with such laws by establishing an employee benefit plan separate from its ERISA-covered plan and such laws do not otherwise offend ERISA.

ERISA defines an employee welfare benefit plan as "any plan . . . established or maintained by an employer . . . for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment . . .." ERISA § 3(1), 29 U.S.C. § 1002(1). Such plans are governed by ERISA unless they are "maintained solely for the purpose of complying with applicable workmen's compensation laws or unemployment compensation or disability insurance laws . . .." ERISA § 4(b)(3), 29 U.S.C. § 1003(b)(3). Given the breadth of the definition of ERISA-covered employee welfare benefit plans, state disability or workers' compensation laws are bound to have some connection with such plans and thus relate to such plans. Indeed, without the exception in section 4(b)(3), all workers' compensation plans maintained by employers, who satisfy ERISA's interstate commerce requirement, would be subject to ERISA. Here, there is no dispute that an employer can comply with the Equity Amendment Act by maintaining a plan solely for that purpose or by amending its ERISA-exempt workers' compensation plan to provide the additional workers' compensation benefits required by the Act.

Second, and in view of the surprising ruling of the court below that the Disability Benefits Law in *Shaw* did not relate to ERISA-covered plans, a ruling that contradicts this Court's description of *Shaw* in *Metropolitan Life* and conflicts with the ruling of the Second Circuit in *R.R. Donnelley & Sons Co. v. Prevost*, 915 F.2d 787 (2d Cir. 1990), *cert. denied*, 111 S. Ct. 1415 (1991), the District has made an alternative argument. If the court below is correct that the Disability Benefits Law did not relate to ERISA-covered plans, neither does the District's Equity Amendment Act and, like the law in *Shaw*, it is not preempted by ERISA.[2]

[2] In view of the foregoing, cases like *Yee v. City of Escondido*, 112 S. Ct. 1522 (1992), do not preclude the District from making the alternative argument in support of its claim that ERISA does not preempt its Equity Amendment Act. Indeed, *Yee* expressly permits a litigant in this Court to make "separate *arguments* in support of a single claim . . .." *Id.* at 1532 (emphasis supplied by this Court). As this Court stated in *Yee*, "[o]nce a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *Id.* Here, the District's claim is that its Equity Amendment Act is not preempted by ERISA, and it has offered two arguments in support of that claim.

Nor has the District waived its alternative argument. First, the District was entitled to take this Court at its word that the Disability Benefit Laws in *Shaw* related to ERISA-covered plans but was never-

[Footnote continued on next page]

ARGUMENT

I. THE EQUITY AMENDMENT ACT IS A WORKERS' COMPENSATION LAW THAT REFLECTS THE GROWING IMPORTANCE OF HEALTH BENEFITS IN AN EMPLOYEE'S COMPENSATION PACKAGE.

The insurance company amici urge, and the United States suggests, that the Equity Amendment Act is preempted by ERISA either because it is not really a workers' compensation law and/or because it is innovative. According to the insurance company amici, "[b]y loading a health insurance benefit onto a workers' compensation law," the Equity Amendment Act cannot "be considered a 'workers' compensation law' " and "by limiting its reach to employees who already participate in employer-paid health insurance, the Act does violence to a cardinal principle that has informed workers' compensation statutes since the first one enacted in 1910: that they protect all employees of all covered employers." Ins. Br. 19. The United States, in turn, suggests that Congress, in enacting ERISA, meant to permit only traditional provisions in workers' compensation laws by its

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theless not preempted, and it was not required to anticipate the D.C. Circuit's contrary ruling. Second, although the court below mentioned that the District did "not dispute that the Equity Amendment Act 'relates to' an ERISA-covered employee benefit plan," (Cert. Pet. App. 11a) the court below made an independent ruling on that matter. Cert. Pet. App. 11a-19a. That independent ruling, the bases for that ruling, and the consequences that flow from that ruling, are reviewable here. In construing a statute as complex as ERISA and in resolving a conflict among the Circuits concerning the meaning of ERISA, this Court surely is not bound by a construction of ERISA offered by a party below based on its understanding of this Court's jurisprudence. Third, even if the District had not raised its alternative argument here, this Court, to ensure that a statute as important as ERISA is properly applied by the lower courts, could have *sua sponte* construed ERISA in accordance with that alternative argument; ruled that both the Second and the District of Columbia Circuits erred in interpreting *Shaw*; and applied the proper construction of ERISA to this case. *See, e.g., Cipollone v. Liggett Group, Inc.*, 60 U.S.L.W. 4703, 4708 (U.S. June 23, 1992) (rejecting construction of two federal statutes urged by both petitioner and respondents); *Arcadia v. Ohio Power Co.*, 111 S. Ct. 415, 418 (1990) (declining to reach the issues decided by court below and argued in this Court in view of this Court's independent construction of the federal statute at issue in the case).

acknowledgement that "[t]here is no doubt that Section 4(b)(3) [of ERISA] embodies Congress's intent to leave intact *traditional state regulation*" of workers' compensation matters. U.S. Br. 19 (emphasis added).

These arguments are flawed. First, as this Court has acknowledged, " 'modern wage payment practices' " have increasingly been affected by employer-paid fringe benefits, including health insurance, and a legislature may properly take such practices into account in defining compensation in workers' compensation and other laws. *Morrison-Knudsen Constr. Co. v. Director, Office of Workers' Compensation Programs*, 461 U.S. 624, 632-33 (1983).[3] Increasingly, many, but not all, workers have foregone higher wages in exchange for such employer-paid benefits. *Id.* at 636.[4] The Equity Amendment Act, therefore, far from violating a cardinal principle of workers' compensation statutes, is fully consistent with that principle — the Act seeks to protect the compensation expectations of "all employees of all covered employers," whether they are compensated solely by wages or whether part of their compensation is health insurance in lieu of wages.[5]

[3] In *Morrison-Knudsen*, this Court declined to construe the term "wages" in a federal workers' compensation law to include the value of fringe benefits, but it clearly did not preclude Congress from doing so. On the contrary, this Court stated that defining compensation in a federal law is "a task for Congress" and observed that Congress had expressly enacted a broad definition of compensation to include the value of employee benefits in other legislation. 461 U.S. at 636. Just as Congress is the appropriate legislature to define "compensation" in a federal workers' compensation law, the Council of the District of Columbia is the appropriate legislature to define that term for its workers' compensation law, as are the state legislatures for their own workers' compensation laws.

[4] At the time of this Court's 1983 decision in *Morrison-Knudsen*, benefits constituted over 15% of compensation costs and there were projections that such benefits "could easily constitute more than one-third of labor costs by the middle of the next century." 461 U.S. at 636. These projections appear to have been modest. As the American Association for Retired Persons notes, by 1990, "the percentage of compensation provided through benefits" amounted "to over 27 percent of payroll." AARP Br. 5.

[5] Nor is the District alone in seeking to conform its workers' compensation law to reflect modern compensation practices. See AARP Br. 6-7. Furthermore, the Equity Amendment Act is consistent with the basic
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Second, this Court has squarely and properly rejected the argument that Congress, by enacting ERISA, intended to bar innovative state responses to changing social and economic problems. *Metropolitan Life Insurance Co. v. Massachusetts*, *supra*, 471 U.S. at 741. This Court has stated that it "must presume that Congress did not intend to pre-empt *areas* of traditional state regulation." *Id.* at 740 (emphasis added). As a consequence, Congress, in enacting ERISA, did not intend "to leave intact [only] traditional state regulation." (U.S. Br. 19) but intended to permit states to regulate as they deem wise "areas" in which they traditionally have regulated, including insurance and workers' compensation.[6]

Third, the United States and the insurance company amici have attempted to erect a false dichotomy between workers' compensation benefits (or benefits in the event of work-related "sickness, accident, [or] disability") and health benefits (or "medical, surgical, or hospital care or benefits").[7] ERISA

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trade-off made in workers' compensation laws — employees give up their right to bring a common law tort action against their employers for work-related injuries in exchange for the right to receive promptly fair and reasonable workers' compensation benefits paid for by their employers. The Board of Trade and several of its amici admit that, if a state were to abolish its workers' compensation system and revert to a common law tort model, an employee injured on the job could, in a tort action against his employer, recover not only lost wages and the medical costs of treating his injury but also the value of benefits, such as health insurance, lost as a result of his work-related injury. Board of Trade Br. 34-35; U.S. Br. 15-16; CBIA Br. 3-4.

[6] Indeed, Congress seems to have intended to allow the states to be innovative. As the United States noted in its brief in *Shaw*, "New York is one of [only] five states that require employers to provide disability benefits in addition to comprehensive workers' compensation benefits." Brief for the United States As Amicus Curiae Supporting Affirmance 5 n.2 in *Werner H. Kramarsky v. Delta Air Lines, Inc.*, No. 81-1578.

[7] See U.S. Br. 3 (quoting only that part of § 3(1) of ERISA referring to "medical, surgical, or hospital care or benefits") and 21 n.11 (quoting only that part of § 3(1) referring to "benefits in the event of sickness, accident, disability . . . or unemployment." The United States also asserts that Congress's use of the phrase "*solely* for the purpose" in section 4(b)(3) "evidences Congress's intent that plans that are maintained for both exempt (*i.e.*, workers' compensation) and non-exempt (*e.g.*, health

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§ 3(1), 29 U.S.C. § 1002(1). There is no sharp line between benefits in the event of work-related injury, on the one hand, and medical benefits and the like, on the other. *Cf. Metropolitan Life Insurance Co. v. Massachusetts*, *supra*, 471 U.S. at 741 (rejecting argument that ERISA sharply distinguishes between "health laws" and "insurance laws"). Indeed, workers' compensation laws throughout the country traditionally have required employers to pay the medical benefits necessary to take care of work-related injuries. 1 A. Larson, Workmen's Compensation Law, § 1.00 (1992). The medical benefits mandated by the Equity Amendment Act are also benefits required only in the event of work-related illness, injury, or death. And while such benefits are required only for employees who otherwise receive such benefits from their employers as active employees — to replace one aspect of the compensation they would have received as active employees — the fact that an employer may not have had a worker's compensation purpose in providing this form of compensation in the first instance does not negate or undermine the District's workers' compensation purpose in enacting the Equity Amendment Act. Just because an employer does not have a workers' compensa tion purpose in paying wages does not mean that the District does not have a workers' compensation purpose in replacing wages lost when workers are injured on the job. l A. Larson, Workmen's Compensation Law, § 1.00 (1992).

In short, despite the fact that the Equity Amendment Act is nevertheless a workers' compensation law,

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benefit) purposes are covered by ERISA." U.S. Br. 19 (emphasis supplied by U.S.). The relevance of this assertion to this case is unclear. Certainly, under *Shaw*, an employee welfare benefits plan that includes benefits required both by a state workers' compensation law and other employee benefits is governed by ERISA. However, as *Shaw* also holds, employers may not escape their state-law obligations by combining workers' compensation benefits with other benefits in a single plan, as employers are now attempting to do. See Okla. Br. 1-7. Under *Shaw*, a state may require employers to establish a separate plan to provide benefits mandated by its workers' compensation law, and, in the District's view, that plan may include not only health benefits for on-the-job injuries but also other health benefits lost as a result of those injuries.

designed to replace the compensation a worker would have received but for his work-related illness or injury. As such, there is a presumption that it is not preempted by ERISA.

II. THE EQUITY AMENDMENT ACT IS NOT PREEMPTED BY ERISA.

A. The Equity Amendment Act Does Not Differ For ERISA Purposes From The Clearly Permissible Law Approved By The Court Below.

The court below ruled that, "[h]ad the Equity Amendment Act related only to the workers' compensation plan — had it, for example, made no reference to existing ERISA-covered plans and simply required all employers to provide specified minimum health benefits for employees receiving workers' compensation — it would clearly have survived preemption under the principles announced in *Shaw*." Cert. Pet. App. 12a. The Board of Trade concedes the validity of this ruling here. (Board of Trade Br. i) but the United States suggests that, even if the law approved by the court below may not be struck down because it is innovative, it may nevertheless run afoul of ERISA, as amended by COBRA. U.S. Br. 15, 17, 21-24. See *infra* at 12-17.

For the reasons that follow, however, the Equity Amendment Act no more relates to ERISA-covered plans than the "free-standing" law approved by the court below. First, the Equity Amendment Act does not expressly refer to ERISA-covered *plans*, as the D.C. Circuit ruled (Cert. Pet. App. 12a), and does not single them out for special treatment. Instead, the Act merely imposes on "[a]ny employer who provides health insurance coverage" to their active employees an obligation to provide "equivalent" coverage to their employees who are eligible to receive workers' compensation. D.C. Code Ann. § 36-307(a-1) (1991 supp.). The Act applies to employers, including the District of Columbia and churches, which are exempt from ERISA. See D.C. Br. 3 n.1, 6 n.5; D.C. Code Ann. § 1-624.3 (1991 supp.) (coverage of

District employees).[8] The fact that the Act expressly applies to employers who provide benefits, and not to ERISA-covered plans, is a point either ignored or minimized by the Board of Trade and the amici supporting it.[9] The fact of the matter is, however, that section 514(a) of ERISA, 29 U.S.C. § 1144(a), is directed at state laws only "insofar" as they "relate to any employee benefit *plan* described in section 1003(a) of this title and not exempt under section 1003(b) of this title." (Emphasis added.)[10] Furthermore, this Court has rejected the argument "that any state law pertaining to a type of employee benefit listed in ERISA necessarily

[8] The insurance company amici suggest that the Equity Amendment Act does not apply to employers in the District who self-insure to meet their workers' compensation obligations. See Ins. Br. 7. This suggestion is erroneous. The Act applies to all employers in the District, not merely those which meet their workers' compensation obligations by purchasing insurance.

[9] By contrast, the United States in *Shaw* (see *supra* at 6 note 6) pointed out: "Although the New York statute is unenforceable against the *plan*, the New York authorities may hold the *employer* responsible for complying with the state disability benefits law since there is available a plan structure that would be excluded from ERISA coverage." U.S. *Kramarsky* Br. 21 (emphasis in original).

[10] The District has long had a provision in its workers' compensation law that does expressly refer to ERISA-covered plans. This provision permits employers to coordinate benefits paid pursuant to their ERISA-covered plans with benefits paid pursuant to the District's workers compensation law, and thereby reduce the benefits that would be payable without this provision. D.C. Code Ann. § 36-308(9) (1981 ed. 1988 repl.) provides:

> In no event shall the total money allowance payable to an employee . . .: (1) As compensation for an injury . . . under this chapter . . . and (3) from *employee benefit plans subject to the Employee Retirement Income Security Act* . . . exceed in the aggregate the higher of 80 percent of the employee's weekly wage or the total of federal payments and *employee benefit plans payments*.

(Emphasis added). Despite the fact that this provision expressly refers to ERISA-covered plans and determines the level of benefits payable under the District's workers' compensation law by reference to benefits payable pursuant to ERISA-covered plans, no employer in the District, including the Board of Trade, has suggested that this provision is preempted by ERISA. Under the Board of Trade's test, however — that workers' compensation laws relate to ERISA-covered plans and therefore are preempted whenever benefit levels are set by reference to ERISA-covered plans — this provision would be preempted. Board of Trade Br. i, 16, 34.

regulates an employee benefit plan, and therefore must be preempted." *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 7 (1987). The language of the Equity Amendment Act, therefore, does not run afoul of ERISA. It merely requires health-care benefits as part of workers' compensation if employers provide such benefits to active workers irrespective of whether they do so pursuant to ERISA-covered or ERISA-exempt plans. Indeed, had ERISA never been enacted, the impact of the Equity Amendment Act on employers in the District would not differ at all.

The court below ruled that the Equity Amendment Act relates to ERISA-covered plans, not because it requires benefits of the type that would be included in ERISA-covered plans if provided voluntarily by an employer subject to ERISA, nor because it requires health-care benefits, but merely because of the method the Act adopts for establishing eligibility for such benefits and the level of benefits to be provided. The court below ruled that the Act impermissibly relates to ERISA-covered plans because "every time an employer considers changing the benefits under its ERISA-covered plan, it would have to consider the effect that such a change would have on its unique obligations to its District employees receiving workers' compensation." Cert. Pet. App. 17a. Thus, the court below ruled that the Equity Amendment Act may discourage some employers from providing health insurance for active workers in their ERISA-covered plans and may cause other employers who do provide such benefits to reduce them. Cert. Pet. App. 17a. The court below was also concerned with subjecting employers with ERISA-covered plans to differing state workers' compensation requirements. Cert. Pet. App. 17a-18a.

ERISA, however, does not preempt state laws merely because they increase an employer's cost of doing business and may, therefore, affect an employer's decision whether to provide employee benefits and at what level. Indeed, even the statute which the court below ruled "would clearly have survived preemption under the principles announced in *Shaw*" (Cert. Pet. App. 12a) would likely have such an impact on employer decisionmaking. Should the District of Columbia, or a state, enact such a statute, and thereby impose greater workers' compensation costs on employers, those costs may cause employers to refrain from providing voluntarily health insurance (or other benefits) in their ERISA-covered employee benefit plans or to reduce benefits provided under such plans.[11] For example, had the District decided that the benefits contained in the Board of Trade's ERISA-covered plan constituted a reasonable level of benefits for all injured workers in the District, the Board of Trade would face the same additional costs of doing business it faces under the Equity Amendment Act.

Finally, it is plain that the court below erred in striking down the Equity Amendment Act because the Act imposes workers' compensation administrative obligations on employers that differ from those of other jurisdictions. See *Mackey v. Lanier Collection Agency & Service, Inc.*, 486 U.S. 825 (1988) (state laws permitting creditors of ERISA-plan beneficiaries to garnish plan benefits do not offend ERISA despite the obvious costs imposed on plans by such laws). As the United States has stated, moreover, Congress, by enacting section 4(b)(3), "expressed its tolerance for resulting inconsistencies in state laws" governing workers' compensation, disability insurance, and unemployment compensation laws. U.S. Br. 19. In short, there is no difference, from the standpoint of ERISA, between the Equity Amendment Act and the workers' compensation law approved by the court below.[12] See also D.C. Br. 18-37; AFL-CIO Br. 5-30.

[11] Employers may also take steps to improve safety in the workplace (and health and safety generally) in order to reduce or eliminate whatever additional costs they may otherwise incur under an improved workers' compensation law.

[12] The insurance company amici assert that the Equity Amendment Act is somehow invalid because they are not "likely" to be able to write insurance policies to comply with it. Ins. Co. Br. 14. This assertion is irrelevant. First, the Board of Trade has not suggested that it cannot comply with the Act. Second, the other amici briefs filed in support of the Board of Trade, particularly that of the Connecticut Business and Industry Association, whose members are subject to the Connecticut statute on which the Equity Amendment Act is modeled, demonstrate that employers can comply and are complying with such a statute. CBIA Br. 2. This assertion is also suspect because employers can, and have been, complying with other provisions similar in concept to the Equity Amendment Act, such as COBRA and state continuation-of-coverage laws. See *infra* at 12-17.

B. COBRA, When Conjoined With ERISA, Does Not Require Preemption.

COBRA[13] represents a very modest attempt by Congress to establish a health-insurance safety net for designated employees.[14] In simplified form, COBRA requires employers, which have 20 or more employees and which provide health insurance to these employees, to give their employees an opportunity to continue this insurance for 18 or 36 months after designated qualifying events. COBRA §§ 601(b), 602(2), 603, 29 U.S.C. §§ 1161(b), 1162(2), 1163. The term "qualifying event" includes a number of "events which, *but for the coverage required under this part*, would result in the loss of [health insurance] coverage of a qualified beneficiary . . .." COBRA § 603, 29 U.S.C. § 1163 (emphasis added). These events include the death of a covered employee; the "termination (other than by reason of such employee's gross misconduct), or reduction of hours, of the covered employee's employment;" and the covered employee becoming entitled to Medicare benefits as a result of a serious and permanent disability. COBRA § 603, 29 U.S.C.§ 1163.[15]

[13] Consolidated Omnibus Budget Reconciliation Act of 1985, Tit. X, Pub. L. No. 99-272, § 10002(a), 100 Stat. 227, codified at 29 U.S.C. §§ 1161-1168. COBRA is an amendment of ERISA and thus part of ERISA. For clarity, however, the District cites ERISA to refer to the pre-COBRA portions of this legislation and COBRA to refer to the amendment.

[14] See Somers, *COBRA: An Incremental Approach to National Health Insurance*, 5 J. Contemp. Health L. & Policy 141 (1989)

[15] The United States asserts (U.S. Br. 15) that all employees receiving workers' compensation are eligible to elect COBRA benefits. The accuracy of this assertion is far from clear. First, as noted, COBRA applies only to employers with 20 or more employees while the District's workers' compensation law applies to virtually all employers in the District. Second, the qualifying events covered by COBRA that are most akin to those also covered by workers' compensation are death or a serious and permanent disability. Workers' compensation laws, however, cover a broader range of work-related injuries and illnesses. These other injuries or illnesses would not be covered by COBRA unless the qualifying event, "reduction of hours," covers them, but the United States cites no authority to support such a definition.

On this point, the District notes one other matter. The United States seeks to distinguish *Shaw* in part on the ground that COBRA does not

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COBRA permits, but does not require, employers to shift the entire cost of such continuation insurance, including administrative expenses, to persons who elect to continue coverage. COBRA § 602(3)(A), 29 U.S.C. § 1162(3)(A). COBRA benefits, therefore, are merely federally-mandated, employer-sponsored, employee-paid benefits; they cannot be regarded as employer-provided benefits.

This modest safety net cannot be construed as a health-insurance ceiling. COBRA, as the language of section 603 suggests, contemplates that employees, who otherwise suffer a qualifying event, may nevertheless not be eligible for COBRA coverage because they continue to receive health insurance benefits from other sources. It appears, therefore, that COBRA can co-exist with the Equity Amendment Act, as well as with other state continuation-of-coverage laws and with ERISA-covered plans providing continuation-of-coverage benefits independently of COBRA.

Thus, the Internal Revenue Service, which is charged with enforcing ERISA and COBRA, has expressed its view that state laws governing health insurance continuation coverage can co-exist with COBRA. In proposed regulations, consisting in part of questions and answers formulated by the IRS, the IRS has stated:

> **Question 41**: If coverage is provided to a qualified beneficiary after a qualifying event without regard to COBRA coverage (e.g., *as a result of state or local law*, industry practice, a collective bargaining agreement, or plan procedure), will such alternative coverage extend the maximum coverage period?
>
> **Answer 41**: (a) The alternative coverage will not extend the maximum coverage period. The end of

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"require the payment of benefits to persons unable to work because of nonoccupational injuries and illnesses, such as pregnancy." U.S. Br. 20. COBRA, however, does not limit "qualifying events" to those occurring in the workplace. Furthermore, if a qualifying event is defined as broadly as the United States otherwise suggests, it would appear that pregnancy, if it resulted in a reduction of hours, could be a qualifying event and thereby potentially trigger COBRA coverage.

> the maximum coverage period is measured solely from the date of the qualifying event, as described in Q&A-39 and Q&A-40 of this section.
>
> (b) If the alternative coverage does not satisfy all the requirements for COBRA continuation coverage, the group health plan covering the qualified beneficiary immediately before the qualifying event is not in compliance with section 162 (k) *unless the qualified beneficiary receiving the alternative coverage was also offered the opportunity to elect COBRA continuation coverage and rejected COBRA continuation coverage in favor of the alternative coverage.* . . .

52 Fed. Reg. 22730 (June 15, 1987) (emphasis in text added).[16] According to the IRS, therefore, COBRA contemplates the continuing validity of state continuation-of-coverage laws and does not outlaw state measures to impose on employers obligations different from and/or greater than those imposed by COBRA.[17] Employers may thus be required to offer employees COBRA coverage as well as continuation of coverage benefits mandated by state law, and employees may elect the option or options that they believe to be in their best interest.

There is not, therefore, as the United States argues, (U.S. Br. 21-24) any conflict between COBRA and the Equity Amendment Act or any other appropriately crafted state continuation-of-coverage law. Employers must offer COBRA coverage to qualifying workers; employers must offer Equity Amendment coverage to workers entitled to receive workers' compensation; and, pursuant to ERISA, employers must offer any continuation of coverage they have voluntarily established in their ERISA-covered plans on the terms set forth in those plans. See D.C. Br. 18. Workers are free

[16] Although the proposed IRS Regulations have not become effective yet, the District believes that the Court may find them useful in evaluating the arguments of counsel for the Department of Labor and the United States that COBRA is an impediment to the Equity Amendment Act.

[17] For a discussion of state continuation-of-coverage laws, see Employer's Handbook: Mandated Health Benefits (Thompson Publishing Group 1992).

to select any or all of the options for which they are eligible, although if they do elect COBRA coverage, employers may require them to pay for it — for both the premium and the expenses of administration.[18]

The argument of the United States must be rejected for another reason. Adoption of the argument that COBRA, in conjunction with the other provisions of ERISA at issue in this case, preempts the Equity Amendment Act would also require preemption of the medical and related-services component of every state workers' compensation law in this country.

The basic District workers' compensation law, like those of the states, requires employers, by insurance or otherwise, to pay for the medical and related costs to treat the injury or illness that rendered the employee eligible for workers' compensation. Such employee benefits are employee welfare benefits within the meaning of ERISA. Such provisions, moreover, are the type of workers' compensation law that even the D.C. Circuit would rule clearly survive preemption under ERISA.

Under the argument of the United States, a ruling preempting the Equity Amendment Act because it requires health benefits other than those which an employer must offer

[18] The United States thus errs in urging that "[i]t would conflict with Congress's purpose in adding a broad preemption provision to ERISA, as well as with the language of Section 514(a), to hold that a private employer sponsoring a health benefit plan is subject to conflicting requirements concerning continuation coverage *under the plan*." U.S. Br. 9 (emphasis added). The Equity Amendment Act is not in conflict with ERISA, even as amended by COBRA, and does not impose any conflicting requirements on ERISA-covered plans. The United States also erroneously asserts that the Equity Amendment Act has made "unenforceable" COBRA's provision requiring employers to give their employees the option of having COBRA coverage but permitting employers "to adopt plans that require employees to assume the cost of continuation coverage under health care plans." U.S. Br. 22. The basic requirement of COBRA is that employers offer their employees an option in their ERISA plans. Even with the Equity Amendment Act, employers may still offer employee-paid COBRA coverage to their employees who suffer a qualifying event that results in the loss of their health-care coverage, and employees are free to accept or reject such coverage. The Equity Amendment Act imposes a distinct workers' compensation requirement.

pursuant to COBRA, would also require preemption of the "free-standing" workers' compensation law approved by the D.C. Circuit. It would thus require preemption of workers' compensation provisions requiring employers to pay for the care of employee on-the-job injuries or illnesses.[19]

This is a result that Congress surely did not intend when it enacted COBRA. Congress, by requiring employers to give employees the option to pay for their own health insurance, could not have intended to relieve employers from having to provide medical benefits to injured workers required by state workers' compensation laws, unless, of course, Congress perpetrated a cruel hoax on American workers when it enacted COBRA.

In short, COBRA establishes a modest health insurance safety net, which, at the option of employers, may be fully financed by those who elect COBRA coverage. COBRA cannot be interpreted as precluding the states and the District of Columbia from providing a more secure safety net, financed in whole or in part by employers, either through their workers' compensation law or through insurance laws saved by section 514(b) of ERISA, 29 U.S.C. § 1144(b). See *FMC Corp. v. Holliday*, 111 S. Ct. 403 (1990); *Metropolitan Life Insurance Co. v. Massachusetts, supra*. This more secure safety net may include a requirement that employers, by insurance or otherwise, pay the expenses necessary to treat the injury rendering an employee eligible for workers' compensation, and it may also include a requirement that employers, by insurance or otherwise, provide medical

[19] Presumably this would be true at least to the extent that injuries or illnesses rendering an employee eligible for workers' compensation also would make an employee eligible for COBRA coverage. If the argument of the United States is so limited, it would make a patchwork of workers' compensation programs, depending on the number of employees an employer has and on whether an injury or illness rendering a worker eligible for workers' compensation also constitutes a qualifying event. If the argument of the United States is not so limited, it would eliminate workers' compensation medical and related benefits even for workers not eligible for COBRA coverage.

benefits that an employee would otherwise lose because of that injury.[20]

[20] The District notes one further matter. The United States seems to meld traditional preemption analysis under the Supremacy Clause with preemption analysis under section 514(a) of ERISA. This Court has recently ruled, however, that when Congress has enacted an express preemption provision in legislation, "there is no need to infer congressional intent to pre-empt state laws from the substantive provisions of the legislation." *Cipollone v. Liggett Group, supra*, 60 U.S.L.W. at 4707 (internal quotation marks and citation omitted).

For the reasons that follow, under either pre-emption approach, the Equity Amendment Act is valid even with consideration of COBRA. Thus, if the subsequently enacted COBRA is considered separate from those provisions of ERISA that have been the focus of this case, it is not invalid under traditional Supremacy Clause analysis. The Equity Amendment Act does not actually conflict with COBRA. *Pacific Gas & Elec. Co. v. Energy Resources Conservation and Development Comm'n*, 461 U.S. 190, 204 (1983). Nor can COBRA be said to so completely occupy the field " 'as to make reasonable the inference that Congress left no room for the States to supplement it . . .' " *Fidelity Savings & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153 (1982), quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

If, on the other hand, COBRA is considered an integral part of ERISA because it amends and adds to the subchapter in which section 514(a) is found, it still cannot be said that the Equity Amendment Act is preempted either because (1) pursuant to *Shaw*, an employer may comply with the Equity Amendment Act by establishing or amending a plan separate from its ERISA-covered plan; and (2) the Equity Amendment Act still would not "relate to" ERISA-covered plans within the meaning of section 514(a). The fact that some ERISA-covered plans must contain federally mandated continuation of coverage benefits does not change the substance of section (4)(b)(3), and the reference to section 4(b)(3) in section 514(a), or the relationship between the Equity Amendment Act and ERISA-covered plans. Insofar as COBRA is concerned, section 514(a) would require invalidation of a state workers' compensation law only if (1) the state sought to enforce its law by requiring employers to alter their ERISA-covered plans; or (2) if the law dealt with COBRA's minimum employer-sponsored continuation-of-coverage options for employees by regulating the content or administration of an employer's COBRA obligations. Neither the Equity Amendment Act nor the District's requirement that employers pay the costs of treating their employees' job-related injuries has any of these effects.

CONCLUSION

Workers' compensation statutes necessarily require the provision of employee welfare benefits within the meaning of ERISA, and plans that provide such benefits would be governed by ERISA were there no exemption for employee welfare benefit plans maintained solely for the purpose of complying with a state workers' compensation law. A workers' compensation statute cannot be invalid because it requires employee welfare benefits, although ERISA would preempt such a statute "insofar as" a state sought to enforce it by requiring employers to alter their ERISA-covered plans or by otherwise interfering with the content or administration of such plans.

The Equity Amendment Act leaves it to employers to determine the content and administration of their ERISA-covered plans. Employers can comply with the Equity Amendment Act by establishing or amending an ERISA-exempt workers' compensation plan that is separate from any ERISA-covered plan they may have.[21] The Equity Amendment Act is not, therefore, preempted even if it "relates to" ERISA-covered plans.

In the alternative, the Equity Amendment Act is not preempted because it does not "relate to" ERISA-covered plans within the meaning of ERISA. The relationships between the Equity Amendment Act and ERISA-covered plans identified by the court below are too tenuous to require preemption. ERISA's preemptive reach does not extend to statutes, such as workers' compensation laws, simply because they require employee medical benefits to be paid as compensation for on-the-job injury and require an employer to establish an administrative scheme, and thus increase an employer's cost of doing business in a particular jurisdiction. Furthermore, the fact that the Equity Amendment Act uses existing employee benefits to determine eligibility for benefits and the level of benefits does not bring into play any additional ERISA concerns.

[21] As the Board of Trade concedes, ERISA " '*does not remove state jurisdiction over plans not subject to the Act.*' " Board of Trade Br. 20, quoting S. Rep. No. 93-127, 93d Cong. 1st Sess. 38 (1973) (emphasis supplied by Board of Trade)

In short, the Equity Amendment Act is a workers' compensation law that seeks to take into account modern compensation practices. It does not offend either ERISA or COBRA.[22]

This Court should reverse the decision of the District of Columbia Circuit.

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[22] Had the Equity Amendment Act done so, Congress had the authority to disapprove it. See D.C. Br. 4 n.2. Congress, which often keeps what the District believes to be a too watchful eye on its purely internal affairs, declined to exercise that authority although the Act plainly deals with employee welfare benefit plans as do ERISA and COBRA.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes and Regulations

Federal

Statutes and Regulations (con't)

District of Columbia

Page

Statutes and Regulations (con't)

Other

Miscellaneous

No. 91-1326

In The
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

DISTRICT OF COLUMBIA
AND SHARON PRATT KELLY, MAYOR,
Petitioners,

v.

THE GREATER WASHINGTON BOARD OF TRADE,
Respondent.

**On Writ of Certiorari to the
United States Court of Appeals
for the District of Columbia Circuit**

Brief of the District of Columbia Insurance Federation, the National Association of Independent Insurers, The Alliance of American Insurers, Liberty Mutual Insurance Company, PMA Group and Metropolitan Washington Association of Independent Insurance Agents as *Amici Curiae* Urging Affirmance of the Decision Below

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The issue in this case is whether the federal Employee Retirement Income Security Act ("ERISA") § 514(a), 29 U.S.C. § 1144(a), preempts an amendment to the District of Columbia workers' compensation legislation styled the

Equity Amendment Act ("the Act"). D.C. CODE § 36-307(a-1) (1990). The Act would impose a new health insurance obligation (a "welfare benefit" under ERISA § 3(1), 29 U.S.C. § 1002[1]), not on all District employers, but only on District employers who already provide health insurance to their employees, and only for employees who have elected to enroll in the health insurance plans offered by their employers.

INTEREST OF AMICI

The District of Columbia Insurance Federation is an association of insurance companies that write insurance in the District of Columbia. Its membership includes most of the insurers who provide workers' compensation insurance to District of Columbia employers. The Alliance of American Insurers and the National Association of Independent Insurers are national associations of insurance companies that write insurance, including workers' compensation insurance, in the District of Columbia. Liberty Mutual Insurance Company is the largest writer of workers' compensation insurance in the District and throughout the United States. PMA Group is a major regional workers' compensation insurer in the mid-Atlantic region, including the District. The Metropolitan Washington Association of Independent Insurance Agents is an association of agents who sell insurance policies, including workers' compensation insurance policies, in the District.

Collectively, *amici* represent the major portion of insurers writing workers' compensation insurance in the District and the agents selling such insurance. Although the Act directs employers to provide the new health insurance benefits, the burden of carrying out the Act's commands falls almost entirely on the workers' compensation insurance industry; by statute and regulation all obligations of employers under the workers' compensation statute must be secured by insurance unless the employer is self-insured. As we show below, the Act is essentially unworkable. It would place an intolerable burden on workers' compensation insurance carriers. They would find themselves obliged to provide health insurance benefits that many workers' compensation insurers have neither the experience nor the expertise to write and which in many circumstances cannot be written at all.

SUMMARY OF ARGUMENT

1.

The District of Columbia has attempted to impose a health insurance obligation on employers by calling it a workers' compensation benefit. No matter how the employer attempts to comply with the Act, the Act still would "relate" to ERISA-covered welfare benefit, health insurance plans. ERISA's preemption clause covers and voids this statute.

2.

Under District law most employers would have to comply with the obligation through their workers' compensation insurance. Because of the vast differences between health insurance and workers' compensation insurance, it would be impossible for any employer to obtain a separate insurance policy to cover this obligation, leaving amendment of ERISA-covered existing health insurance plans the only way to comply.

3.

The Act improperly tacks health insurance benefits onto

a workers' compensation statute. States universally provide for workers' compensation by law as a trade-off for relieving employers of tort liability. Health insurance is voluntary, governed by contract and often comes out of the tug and pull of collective bargaining. The two insurance systems and the insurance carriers that provide the coverage are too different to be linked in this way.

4.

Shaw v. Delta Airlines, Inc., 463 U.S. 85 (1983), does not save the Act from preemption.

a. *Shaw* held that a New York disability insurance statute that imposed disability benefits requirements for pregnancy on employers was not preempted by ERISA. Disability benefits plans are exempt from ERISA preemption. A disability insurance plan set up specifically to comply with the New York statute was within the exception for disability benefits. The Act is a workers' compensation statute that imposes health insurance plan obligations on employers. Health insurance is not exempt from ERISA preemption.

b. A health insurance plan set up to comply with the Act is still a health insurance plan and not within the exception for workers' compensation benefits. The Act thereby encroaches on an area of exclusively federal concern by going beyond the usual purpose and reach of workers' compensation. As the Court held in *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 525-26 (1981), ERISA preempts any state enactment that attempts to do this.

c. If the Act is not held preempted, the door is open to the states to impose all kinds of health and pension benefits

obligations on employers not only through workers' compensation legislation but also through unemployment compensation legislation, forcing changes in the terms of ERISA-covered plans. ERISA's preemption clause surely was intended to prevent this.

ARGUMENT

I. THE ACT RELATES TO ERISA PLANS, CONFLICTS WITH ERISA AND IS PREEMPTED.

A. The Act Refers Expressly to and Obviously "Relates to" ERISA Welfare Plans.

1. The Act Seems To Have Been Designed To Evade ERISA Preemption

The Act and its applicable regulations purport to fold ERISA-controlled health insurance benefits into ERISA-exempt workers' compensation plans. As written, the Act would

-- require employers who provide health insurance for their employees to provide "equivalent" health insurance coverage for participating employees who are injured on the job and become eligible for worker's compensation, including coverage for other family members where the employee has elected family coverage. D.C. CODE § 36-307(a-1)(1).

-- provide that such health insurance benefits are payable only when injured employees are "away from work" due to the work-related injury. *Id.* § (a-1)(2)(A).

-- require employers to continue such coverage for the duration of the injury and any recurrences, up to a maximum of 52 weeks. *Id.* § (a-1)(1), (3).

-- require employers to pay employees' normal contribution towards their coverage under the health insurance policy even if, as nearly all employer health plans provide, employees are obliged to pay a portion of the health insurance premium themselves. *Id.* § (a-1)(4).

-- appear to require employers to pay the normal deductible (ordinarily anywhere from $100 to $1,000) and co-payment (often 20%) that employees usually pay before the insurer's obligation kicks in. *Id.*

-- fix the health insurance benefits to be provided to injured workers' compensation-eligible employees as of the date of an injury, even if the employer or its health insurance carrier makes a change in the plan or policy provisions thereafter. *Id.* § (a-1)(1); 7 DCMR § 213.2 (pending).

-- do not impose any equivalent burden on employers who provide self- funded health care reimbursement plans, for example by direct payment to health maintenance organizations.

-- impose the duties of paying injured employees' premium shares and providing the health insurance benefits (i.e. paying the provider or reimbursing employees for payments to providers for treatment of employees and their families) on employers' workers' compensation insurance carriers; except for the very few self-insured employers, all workers' compensation benefits in the District of Columbia must be paid for and provided by insurance, D.C. CODE § 36-334, and the workers' compensation insurance carriers are expressly made responsible for providing the Act's health insurance benefits, 7 DCMR § 214.5, 7 DCMR § 213.7 (pending).

-- provide no such health insurance benefits for employees injured on the job whose employers do not offer health insurance as a fringe benefit or who have declined employer-offered health insurance.

In summary, the Act requires employers who have ERISA § 3(1) health insurance plans either to change their plans to conform with the Act or, theoretically, to maintain separate health insurance plans for workers who are injured on the job. By the Act the District seeks to evade ERISA preemption and substitute state for federal ERISA regulation of employers' ERISA-covered health insurance plans.

2. The Act Is Inextricably Tied To ERISA-Covered Plans

On its face the Act's requirement that employers provide health insurance coverage to injured workers is couched as a workers' compensation benefit. But the Act does not require all employers to provide health insurance benefits for all workers' compensation eligible employees. *Greater Washington Board of Trade v. District of Columbia*, 948 F.2d 1317, 1323, 1324 text at n. 21 (D.C. Cir. 1991) ("*GWBT*"). It reaches only those employers who have health insurance plans already in place. Its benefits reach only those employees who already participate in their employers' plans. Its mechanism is for the new workers' compensation health benefit to duplicate whatever benefit the plan happens to provide as of the date the worker is injured. It does not cover employers who provide health benefits to their employees by means other than insurance. In the simplest terms announced by this Court, the Act "refers to -- indeed solely applies to -- ERISA employee benefit plans," is a "state law which singles out ERISA plans, by express reference, for special treatment," and it

therefore "is preempted." *Mackey v. Lanier Collections Agency*, 486 U.S. 825, 829, 838 n. 12 (1988).

Both the Second Circuit and the D.C. Circuit agree that the virtually identical Connecticut and District of Columbia statutes "relate" to employee benefit plans within the meaning of ERISA § 514(a). *R. R. Donnelley & Sons, Inc. v. Prevost*, 915 F.2d 787, 791-92 (2nd Cir. 1990), *cert. denied*, ___ U.S. ___, 111 S.Ct. 1415, 113 L.Ed.2d 468 (1991) ("*Donnelley*"); *GWBT*, 948 F.2d at 1322. *Donnelley* held that the Connecticut statute survived preemption because it permitted employers to provide the required health insurance benefits by setting up a separate health insurance plan for injured employees. The Second Circuit considered that this would be a plan established "solely for the purpose of complying with applicable workmen's compensation laws," excluded from ERISA coverage altogether by § 4(b)(3), 29 U.S.C. § 1003(b)(3). 915 F.2d at 793. *GWBT* held that the Act was preempted despite § 4(b)(3), because (1) even a separate plan would tie "the new benefits to existing benefits," 948 F.2d at 1324, (2) the requirements of the Act burdened only "employers already providing benefits through ERISA plans," *id.*, and (3) it would undermine "the broad purposes of ERISA preemption," *id.* at 1325.

Those purposes include protecting ERISA plans from a "patchwork scheme of regulation" by different states, which might discourage employers from adopting or maintaining ERISA plans. *Id.*, quoting *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 11 (1987). To serve those purposes the Court has construed ERISA preemption broadly and has construed exceptions from preemption narrowly. The Court reaffirmed § 514(a)'s "broad preemptive purpose" just a month ago. *Morales v. TWA*, No. 90-1604, 60 U.S.L.W. 4444, 4446 (U.S. S.Ct., June 1, 1992), quoting and citing this Court's ERISA preemption cases: *Ingersoll-Rand Co. v. McClendon*, 498 U.S. ___ (1990); *FMC Corp. v. Holliday*, 498 U.S. ___ (1990); *Pilot Life Ins. Co. v. Devereaux*, 481 U.S. 41 (1987); *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724 (1985), and *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983). *See also Gade v. National Solid Wastes Management Ass'n*, No. 90-1676, 60 U.S.L.W. 4587, 4591-97 (plurality opinion), 4593 (concurring opinion) (U.S. S.Ct., June 18, 1992).[1]

B. Whether an Employer Amends an Existing Health Benefits Plan or Sets Up a New Separate Plan to Comply With the Act, the Act Will "Relate To" an ERISA Welfare Plan.

If the employer complied with the Act by amending its existing health insurance plan, the Act not only would "relate to" but would force a change in an ERISA-covered plan. The alternative is for employers to set up separate health insurance plans with benefits "equivalent" to the covered plan's benefits (but with a 52 week limit and 100% employer-paid premiums, deductibles and co-payments). *GWBT*, 948 F.2d at 1325. The D.C. Circuit pointed out that even this would "have a serious impact on

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[1] *Gade* indicates that if there were any doubt about express preemption here ERISA would nonetheless impliedly preempt the Act. It "sufficiently interferes with federal regulation" of welfare benefit plans "to be deemed preempted, because it "directly, substantially, and specifically regulates" health insurance plans. 60 U.S.L.W. at 4592 (plurality opinion).

the administration and context of the ERISA-covered plan." *Id.* Any employer contemplating a change in the ERISA-covered plan would have to consider the equivalent change in the workers' compensation health insurance plan and, as we also noted (p. 8 *supra*) this could persuade employers that health insurance plans were more bothersome than beneficial. *Id.* Such a result is surely contrary to Congress' intentions, especially in a time when greater, not lesser, access to health insurance is a national imperative.

Of course any such new, separate health insurance plan would itself be an ERISA-covered "welfare benefit plan" under ERISA § 3(1), 29 U.S.C. § 1002(1), providing medical, etc. benefits in the event of accident. So however employers decided to meet the Act's demands, the Act would "relate" to ERISA- covered plans by tying the workers' compensation mandated health insurance to the benefits stated in the existing ERISA-covered plan and by requiring employers either to amend their existing ERISA-covered plans or set up new ERISA-covered plans.

No insurance company will sell and no employer will be able to purchase such a separate workers' compensation-limited health insurance plan.

II. NO SEPARATE HEALTH INSURANCE PLAN EXCLUSIVELY FOR WORKERS' COMPENSATION RECIPIENTS IS FEASIBLE

Petitioner, its supporting amici and the Second Circuit all ignore a stubborn fact. In the real world of workers' compensation, which in the District of Columbia most employers must provide by insurance, the notion of separate health insurance plans exclusively for injured

workers, "maintained solely" to comply with the Act, purportedly a workers' compensation law, is pure fiction.

A. A Typical Example Shows the Problems the Act Would Create

Let us consider Mary Smith. Ms. Smith, employed in the District of Columbia, develops "carpal tunnel syndrome," a painful inflammation of the wrists, from the repetitive motions of her job. It is typical with this common work-related condition that Ms. Smith is better on some days than on others. She may be out of work for several days or several weeks at a time, returning to work whenever her condition permits. She applies for and receives workers' compensation for the wages lost during the days she does not report for work and for her medical expenses.

Ms. Smith has health insurance as a member of a group insured through her employer. Ms. Smith has family coverage of her husband and two minor children. The plan happens to include dental coverage. The cost of the plan is $450 a month; Ms. Smith pays $100 for her own coverage and $100 for her family's coverage. Her employer pays the other $250, or 55.56% of the total.

Ms. Smith is initially out of work for seven days. For those seven days, under the Act her employer would be obligated to pay 100% of her health insurance premium. So during that month of 21 working days, the employer would pay the full premium, $150, for the seven days, plus $144.44 for the rest of the month. Ms. Smith would pay $166.67. Every time Ms. Smith loses a day of work the employer would make a similar calculation and every time the employer would submit a claim for the additional premium to its workers' compensation insurance carrier.

Then (as they always do) health insurance premiums go up. To keep its costs from rising, the employer drops the dental benefits. Ms. Smith's children need dental work. Since Ms. Smith had dental benefits on the day she first "became eligible for workers' compensation benefits," the Act requires her employer somehow to provide a dental benefits insurance plan for the Smith children -- but only during those days when Ms. Smith is unable to come to work because her wrist hurts too much. Where is the employer to find a health insurance plan that provides dental benefits for only one of its employees (and her family) and then only on those days when she is away from work?

Ms. Smith's carpal tunnel injury does not get better. She cuts her work back to half time. Now Ms. Smith is "away from work" half of every day. The employer's workers' compensation insurance policy pays two thirds[2] of her lost wages for the half day she does not work. Does the Act require payment of half of her share of the premium for health insurance? It is common for employer group health plans to cover only employees who work more than half time. The Act would seem to require Ms. Smith's employer to find a separate plan to cover her and her family for half of each day.

Ms. Smith goes to a new job where no health insurance is provided at all, or where the health insurance plan excludes pre-existing conditions. Whenever Ms. Smith's carpal tunnel syndrome recurs and she is unable to go to work, her former employer's workers' compensation

[2]*See* the discussion of the workings of workers' compensation at IIIA, pp. 15-17 *infra*.

insurance policy pays her two thirds of her wages lost for those days. The Act requires the former employer, through its workers' compensation insurance carrier, to provide her and her family with her old health insurance coverage for those days until 52 weeks are exhausted.[3]

Ms. Smith's former employer goes out of business and its group insurance health plan lapses -- except for Ms. Smith, since workers' compensation insurance coverage (that under the Act now includes health insurance) continues as long as the worker remains disabled by the work-related injury. The employer's workers' compensation insurance carrier becomes a health insurance carrier by force.

The workers' compensation insurer must calculate the prospective, combined long-term risks of loss under the Act taking all of these imponderables into account. It must charge a premium to the employer that reflects that risk. For the workers' compensation insurance industry the Act would create a nightmare.

B. No Workers' Compensation Insurance Carrier Could Write a Separate Health Insurance Policy To Fulfill the Act's Requirements

Mary Smith's case, repeated many times but with virtually infinite variations, demonstrates why in the real world there is no possible separate plan alternative available even arguably to save the Act from interfering with ERISA-covered welfare benefit plans or save it from

[3]Or for the rest of Ms. Smith's working life if she happened to work in Connecticut instead of the District of Columbia. The Connecticut statute does not limit coverage to 52 weeks.

preemption. The only kind of separate plan that would satisfy it is a separate health insurance policy covering an unknown and unknowable number of Mary Smiths, with unknown and unknowable health conditions, and for unknown periods of time up to a potential total of 52 weeks that could be interpreted to stretch intermittently over entire working lives. Under the Act that policy would have to be procured or written by workers' compensation insurance carriers that are casualty, not life or health companies, that ordinarily are not licensed to write or sell health insurance, that may have no experience in calculating the risks involved in health insurance to set premium rates and whose premium rates would have to be approved by regulators.

No workers' compensation insurance carrier presently writes such a policy or is likely to be able to do so. Employers would be able to satisfy the Act only in one way. They would have to amend their existing health insurance plans and claim reimbursement from their workers' compensation insurance carriers for the additional costs. In turn, the workers' compensation carriers would then satisfy their statutory duties by reimbursing employers for the premium share of injured employees who are participants in the plan, the additional premium for family coverage of such injured employees with family coverage and the deductible and co-payment obligations of injured employees in the event of non-work-related illness or injury during the period of work-injury-related disability (up to 52 weeks).

There can be no doubt that Congress' ERISA preemption provision was designed to prevent such results of state meddling with ERISA-covered plans.

III. THE ACT'S INTRUSION INTO THE HEALTH INSURANCE AREA GOES WELL BEYOND THE PURPOSE, REACH AND MECHANICS OF WORKERS' COMPENSATION

A. Workers' Compensation Is Mandatory, Narrowly Limited and Enforced By an Elaborate System of Administrative Law

The District's workers' compensation statute is a typical, comprehensive procedural and substantive scheme for accomplishing a specific, narrow purpose -- payments for all work-related injuries -- in a speedy, efficient way. It covers work-related injury to or death of all employees working in the District of Columbia for all employers except the United States and District of Columbia government and the United States Congress. D.C. CODE §§ 36-301(9), (10), (12), 36-303(a). Compliance is mandatory. Employers' liability attaches regardless of fault, § 36-303(b). Employers are absolved from any other liability to anyone and employees' right to workers' compensation is exclusive of other remedies, § 36-304(a), (b). That is, the workers' compensation remedy replaces any tort remedy.

Compensation payable for permanent total disability as income replacement is limited to two thirds of an employee's average weekly wage, §§ 36-308, 36-311. It is further limited to the overall average weekly wage in the District of Columbia or $396.78, whichever is greater, § 36-305. The base for the two thirds figure is the employee's "wage loss," i.e. it is reduced by the amount he is able to earn despite the disability, § 36-308. The average weekly wage includes the value of board and lodging, but no other fringe benefits like health insurance.

(A few states do include the value of health insurance premiums in the wage base.)

Weekly payments for total disability continue as long as the disability continues. Partial permanent disability is compensated according to a schedule specifying a certain number of weeks of compensation for the loss, e.g., of an arm (312 weeks), eye (160 weeks), hearing in both ears (200 weeks), etc. § 36-308.

Compensation also includes 100% of employees' medical expenses resulting from the injury, including rehabilitation services. § 36-307(a). There are no deductibles or co-payments. In the case of death the employee's relicts receive up to $5,000 for funeral expenses; his widow or her widower receive 50% of the deceased's average wages; surviving children divide another 16 2/3%, raised to 50% upon the death or remarriage of the widow or widower. § 36-309. Employers must report all worker injuries to District authorities and keep a record of them, §§ 36-332, 36-331. They must post notices regarding workers' compensation rights and coverage.

An employer may challenge an employee's claim for workers' compensation on the ground, *inter alia*, that the injury was not work related. §§ 36-303(d), 36-320, 36-322. If one does, a full evidentiary hearing is held and the decision is appealable to the District of Columbia Court of Appeals, §§ 36-322, 36-329. If the employee then prevails he is entitled to payment of his attorney's fees by the employer. § 36-330.

Employers are required to "secure" payment of workers' compensation benefits by insurance issued by an approved insurance carrier. §§ 36-334, 36-336, 36-338. Premium rates are regulated. §§ 35-1514(2)(A), 35-1702(3). Policy

provisions are clear and simple; they cover whatever the applicable workers' compensation law requires. Employers may apply for and obtain permission to self-insure. § 36-334. Only a few very large employers do so.

All carriers and self-insured employers contribute to a special "second injury" fund that is used primarily to pay compensation for recurrence of an injury. § 36-340. The Act uses the special fund as the means for payment of the new health insurance benefits. Carriers and self-insured employers would pay into the fund and be reimbursed from the fund for the costs of the new benefits. D.C. CODE § 36-307(a-1)(5); 7 DCMR § 213.4 (pending).

B. Health Insurance Is Voluntary, Complex, Has Many Variations and Is Governed By Contract, Not Administrative Enforcement

None of these administrative, procedural and substantive requirements apply to employer-provided health insurance. No state does, nor consistently with ERISA may, require employers to provide health insurance.[4] By Congress' design in ERISA, non-unionized employers are free to design plans that make economic sense for them, while unionized employers are free to negotiate such plans with the employees' unions as their relative bargaining strength

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[4]Except Hawaii, by Congress' express but limited exemption of the Hawaii Prepaid Health Care Act from § 514(a) of ERISA. P.L. 97-473, § 301(a), 96 Stat. 2611, 97th Cong., 2nd Sess. (1983), codified as 29 U.S.C. § 1144(b)(5). The exemption was enacted to reverse *Standard Oil Co. of California v. Agsalud*, 633 F.2d 760 (9th Cir. 1980), *aff'd*, 454 U.S. 801 (1981), in which the Hawaii Act was held preempted by ERISA and void. *See* 1982 U.S. Code Cong. & Admin. News 4595.

permits and the economic mix of wages and benefits commend to them. Some plans offer a choice (a "cafeteria") of benefits for employees to choose from. Many plans provide optional coverage for the employee's family.

By Congress' design in ERISA's preemption clause, states may neither interfere with, mandate changes in nor regulate such employer welfare plans, save as they may regulate the business of insurance, *see*, *e.g.*, *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724 (1985).[5] Employer welfare benefit plans need not file reports about employee claims with state authorities. Instead they must file elaborate reports with the Secretary of Labor, *see* 29 C.F.R. §§ 2520.101-1 *et seq*. No administrative agency adjudicates disputes over the validity of a health insurance claim or over the amount to be paid to a provider.

Employers and their plans are under no legal obligation to provide 100% or any percentage of medical expenses for a covered illness or non-work-related injury. Employers and their plans may require employees to pay any percentage of the premium cost for themselves and for their families. Plans normally require employees to pay a flat

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[5]The District has enacted several provisions regulating the health insurance industry. Statutes prescribe coverage for Medicare supplement policies, D.C. CODE §§ 35-2201 *et seq.*, require coverage for newborn infants, drug abuse, alcohol abuse and mental illness in all health insurance policies, §§ 35-1101 *et seq.*, 35-2601 *et seq.*, restrict health insurers' ability to exclude coverage of HIV infections or AIDS, §§ 35-221 *et seq.*, require approval of the coverage and premium rates of and prescribe that certain provisions be included in all individual (i.e. non-ERISA-covered) health insurance and accidental injury policies, §§ 35-517, 35-1532, require coverage for treatment by psychologists and optometrists, § 35-530, and regulate credit health insurance, §§ 35-1001 *et seq.*

deductible amount and co-pay a percentage (typically 20%) of medical expenses incurred up to some maximum. Employees are free to decline coverage for themselves (if, for example, a spouse's plan is cheaper or has better coverage) or for their families, keeping the premium contribution they otherwise would have to pay.

Health insurance policies contain elaborate provisions regarding, for example, coverage of pre-existing conditions and "experimental" treatment, and respecting "participating" vs. non-participating providers, upper limits of liability, restrictions on reimbursable hospital accommodations, and so forth. Benefits and premiums vary widely.

By loading a health insurance benefit onto a workers' compensation law, the Act strays too far from the generally understood definition, scope, purpose and mechanics of workers' compensation to be considered a "workers' compensation law" under ERISA § 4(b)(3). Most important, by limiting its reach to employees who already participate in employer-paid health insurance, the Act does violence to a cardinal principle that has informed workers' compensation statutes since the first one enacted in 1910: that they protect all employees of all covered employers.

C. The Act Creates An Unworkable Scheme

By definition, the Act applies only to employers who already provide medical benefits to their employees through health insurance policies. Those insurance policy plans would continue to be covered by ERISA and federal regulation. They would continue to be administered by experienced health insurance carriers. They would continue to provide specified benefits that may change by contract between employers and carriers. Such plans feature employee-paid premium contributions, deductions

and co-payments and cover illnesses and injuries of all participating employees and their families (if family coverage has been elected) at all times.

Any plan amended or created to comply with the Act would create, in the guise of a workers' compensation benefit, a special, constantly changing class of health insurance beneficiaries with benefits and premium obligations governed by District of Columbia law and regulation and not by contract, ERISA and federal regulation. The members of this class would be absolved from premium contributions (and perhaps from deductibles or co-payments). They would receive benefits that do not change as they do for all other covered employees if the contract changes. Their benefits would be fixed as of the date of injury, but only for the time that they were away from work and only up to a maximum of 52 weeks. As soon as they return to work their benefits revert to the provisions of the employer's general health insurance plan, which may have changed since the injury. The Act's lack of a contrary provision indicates that the 52 week period may be a "bankable," as opposed to a calendar, 52 weeks; i.e. the benefits may be available during recurrences of the injury however separated in time until the 52 weeks are used up, even if that is many years.

The separate class of employees would number between none and many at any particular time. It would change constantly, including only those employees who were injured on the job and are away from work, but not even all of them; the Act's benefits cover only injured employees whose employers provide medical benefits through insurance, and who already participate in the employer's insurance plan.

Workers' compensation insurance carriers would have to provide these benefits. Workers' compensation insurance carriers are classified as "casualty" insurers, regulated under Chapter 15 of D.C. CODE Title 35. Health insurers are classified as "life and health" insurers and are regulated under Chapter 5 of D.C. CODE Title 35. Workers' compensation insurers often have no experience in health care claims evaluation, health care costs, health benefits administration or the increasingly complex federal- private cost limitation and reimbursement system.[6] They nevertheless may well become subject to a whole range of ERISA reporting obligations respecting their performance of the Act's health insurance requirements. *See* ERISA § 103, 29 U.S.C. § 1023; 29 C.F.R. § 2520.101-1 *et seq.*; *Schulist v. Blue Cross of Iowa*, 717 F.2d 1127, 1132-33 (7th Cir. 1983).

To sum up: the problem the Act creates for the workers' compensation insurance industry arises directly from the difficulty of attempting to force one kind of insurance -- health insurance -- into a totally different kind of insurance scheme, namely workers' compensation.

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[6]*See, e.g.*, the new federal Health Care Financing Administration ("HCFA") regulations which mandate specific allowable physician, hospital, therapist and other health care provider fees for over 10,000 different medical services. 42 C.F.R. Parts 405, 413, 415, 56 Fed. Reg. 59501 *et seq. (1991)*, "Medicare Program; Fee Schedule for Physicians' Services, Fee Schedule Update for Calendar Year 1992 and Physician Performance Standard Rates of Increase for Federal FY 1992; Final Rules and Notice."

IV. THE PRINCIPLE OF *SHAW V. DELTA AIRLINES* DOES NOT SAVE THE ACT FROM PREEMPTION

A. In *Shaw* New York Tied ERISA-Exempt Disability Benefits to a Disability Benefits Statute. Here the District of Columbia Hangs ERISA-Covered Health Insurance Benefits Onto a Workers' Compensation Statute.

Petitioner, its allied *amici* and the Second Circuit all have ignored a crucial and dispositive difference between the disability insurance law that *Shaw* approved and a health insurance law that is labeled "workers' compensation" like the Connecticut statute approved in *Donnelley* and the Act at issue here.

The *Shaw* statute required employers to extend disability insurance to pregnant women. State-mandated disability insurance is a plan expressly exempted from ERISA § 4(a) coverage by § 4(b). The statute's impingement on ERISA-covered plans was accidental. It arose only from the circumstance that many employers included disability benefits in multibenefit welfare plans that included other benefits such as health insurance. *Shaw*, 463 U.S. at 92, 106-07. What saved the New York statute was the hypothesis that employers could satisfy it by setting up a separate pregnancy-disability plan. That would be a plan set up "solely" to comply with a state disability insurance law, exempt from ERISA under § 4(b)(3). It would be an employer disability income plan set up to comply with a disability insurance statute: apples and apples.

The Connecticut and D.C. statutes are not apple-apple statutes like the *Shaw* statute. Accepting (as the Second

Circuit and D.C. Circuit did) the applicability of the *Shaw* hypothesis of a separate health insurance plan for injured, workers' compensation eligible employees, the Connecticut and D.C. statutes are apple-orange statutes. That is, they would have employers -- but only employers who already have ERISA-covered health insurance plans in place -- set up a *health insurance* plan to comply with *workers' compensation* laws.

The impingement of these statutes on ERISA-covered plans is not accidental as it is with the Shaw statute. Rather it is the essence of the Connecticut and D.C. statutes. Their reach is both defined by and confined to ERISA-covered welfare plans and the employers who have them. Their purpose and effect is to impose new, non-contractual burdens on employers who offer ERISA-covered welfare benefits, which by definition are voluntary.

B. *Alessi* Precludes Approval of the Act

This Court already has rejected a similar state effort to encroach on an ERISA-protected preserve via a purported workers' compensation law. In *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. at 521-26, the Court struck down New Jersey legislation that forbade employers to offset workers' compensation payments against retirement pension benefits. ERISA preempted and voided the statute, because it "related" to ERISA-covered pension plans and was an impermissible intrusion into an ERISA governed area.

The Court held that ERISA preempted "even indirect state action bearing on private pensions" because it "may encroach upon the area of exclusive federal concern.... ERISA's authors clearly meant to exclude the States from

avoiding through form the substance of the preemption provision." 451 U.S. at 525. The holding applies equally to ERISA welfare benefit plans, equally protected from state encroachment by ERISA preemption.

Alessi also resolves the confusion about preemption and exemption from preemption that infects petitioner's and its allies' briefs. "The only relevant state laws, or portions thereof, that survive ... preemption ... are those relating to plans that are themselves exempted from ERISA's scope." 451 U.S. at 523 n. 20. On the other hand, the ERISA exemption "for plans maintained *solely* for compliance with state workers' compensation laws -- has no bearing on ... plans ... which more broadly serve employee needs...." *Id.* (emphasis is the Court's).

Here the Act is a "portion" of a workers' compensation law that undeniably affects "plans which more broadly serve employee needs," to wit, by requiring either amendment of employers' existing medical benefit health insurance plans or by requiring establishment of new ones. Health insurance "more broadly serves employee needs" than the kind of benefits workers' compensation laws provide. The "need" it serves, comprehensive health protection for the whole family, is not a need traditionally served by the workers' compensation legislation that Congress had in mind when it exempted workers' compensation from ERISA coverage. *See* pp. 15-17 *supra*.

The Act impermissibly encroaches on an "area of exclusive federal concern." Moreover, its approval would open the door to far greater encroachments.

C. The Principle Behind the District's Position Reaches Too Far

The potential reach of the principle behind petitioner's position is vast. If this amendment to a workers' compensation law may lawfully expand ERISA health insurance benefits, another amendment to a workers' compensation law could expand pension benefits. It could, for example, require employers to begin paying pension benefits to injured employees for the duration of their injuries (as in Connecticut) or for 52 weeks (as in D.C.). It could require these payments whether employees are vested or not and whether they have reached retirement age or not. Alternatively such an amendment could require employers to continue contributing to injured employees' pensions even if the plan provided otherwise.

The principle would allow imaginative state legislators to load similar provisions onto unemployment compensation laws, also exempt from ERISA under § 4(b)(3). If petitioner's argument is accepted, state legislatures could require employers indefinitely to continue health insurance, to contribute to pensions or to pay pension benefits for fired or laid-off employees, no matter what their ERISA plans provided.

The principle also could work the other way. Petitioner's and its allies' position would permit state legislatures to enact workers' compensation amendments that absolved employers from paying any health insurance benefits to injured employees beyond paying for treatment for the injury even though the bargained-for ERISA welfare plan required their continuation. It would permit workers' compensation amendments that allowed employers to stop contributing towards the injured employee's pension

even though the bargained-for plan required such contributions to continue.

In sum, the kinds of welfare and pension benefits that employers provide to employees would not depend on collective bargaining agreements protected since the Wagner Act[7] by federal regulation nor would they be subject only to the commands of ERISA and its regulations. Instead they would be subject to the political winds blowing from whichever side, labor or management, had more political influence from state to state. Congress surely never intended such chaos.

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[7]The Court noted in *Alessi*:

> Where, as here, the pension plans emerge from collective bargaining, the additional federal interest in precluding state interference with labor-management negotiations calls for preemption of state efforts to regulate pension terms.

451 U.S. at 525.

CONCLUSION

The decision of the U.S. Court of Appeals for the District of Columbia Circuit should be affirmed.

Respectfully submitted,

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No. 91-1326

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

THE DISTRICT OF COLUMBIA AND
SHARON PRATT KELLY, MAYOR,
Petitioners,

v.

THE GREATER WASHINGTON BOARD OF TRADE
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF AMICUS CURIAE OF AMERICAN OPTOMETRIC ASSOCIATION IN SUPPORT OF PETITIONERS

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May 1992

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Table of Authorities Continued

Table of Authorities Continued

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BRIEF AMICUS CURIAE OF AMERICAN OPTOMETRIC ASSOCIATION IN SUPPORT OF PETITIONERS

The American Optometric Association submits this brief amicus curiae in support of petitioners. Letters granting consent, received from counsel for each of the parties, have been filed with the Clerk of this Court.

INTEREST OF AMERICAN OPTOMETRIC ASSOCIATION

The American Optometric Association ("AOA"), a nonprofit membership organization incorporated un-

der Ohio law, is a national professional association of more than 29,000 members consisting of licensed Doctors of Optometry, optometry students,and educators. AOA's objects, as set forth in its Constitution, "are to improve the vision care and health of the public and to promote the art and science of the profession of optometry." AOA has as affiliates the State optometric associations in each of the 50 States and in the District of Columbia, the Armed Forces Optometric Society and the American Optometric Student Association.

As the national professional organization representing the optometric profession, AOA has always been, and is now, vitally interested in matters affecting the adequacy of vision care available to the public. This includes, among other things, AOA's interest in supporting and sustaining what is usually called "freedom of choice" legislation. "Freedom of choice" is the universally enacted State legislation which, so far as it applies to the field of vision care, prevents insurance companies, health benefit plans and others from discriminating against the practice of optometry; it likewise prevents discrimination against patients who in obtaining vision care wish to utilize the professional services of optometrists instead of physicians for those services within the lawful scope of the practice of optometry.

The present case is one of a series that—depending on what this Court says about the scope of the ERISA preemption—may have a substantial impact on such matters on a national basis. When the Massachusetts ERISA litigation was before this Court, AOA filed a brief amicus curiae in support of the Commonwealth of Massachusetts, urging affirmance. The Massachu-

setts court had held that the "mandated benefit" provision (requiring reimbursement to be made for certain mental illness costs), which the Massachusetts statute made applicable to employee health benefit plans placed with insurance carriers, was not preempted by ERISA because such application of the mandated benefit statute was saved by the insurance savings clause in ERISA's preemption provision. This Court affirmed the judgment. *Metropolitan Life Insurance Co.* v. *Massachusetts*, 471 U.S. 724 (1985). AOA also urged that, no matter what decision this Court might reach as to whether the Massachusetts mandated benefit statute was preempted, the Court should in any event avoid any intimation which might impair or cast a cloud on the continuing validity of the widely-adopted, but very different, State freedom of choice legislation. We submit that the Court's opinion in *Metropolitan Life* was responsive to this concern, and that the Court's opinions in subsequent ERISA preemption cases have manifested a similar caution.

The substance of AOA's position is this: While the broad preemption language in ERISA is to be interpreted generously, the preemption should not be given an overzealous overbreadth which would smother legitimate State legislation that Congress never would have intended to displace. The present case involves a 1991 amendment, D.C. Code (1991 Cum.Supp.) §36-307(a-1), to the District of Columbia workers compensation legislation, which permits an employer to comply with the workers compensation law by establishing an employee benefit plan separate from the employer's ERISA-covered benefit plans provided that the separate plan establishes benefits equivalent to those established by the workers compensation law.

In holding that this statute is preempted, the District of Columbia Circuit has stretched the ERISA preemption beyond reasonable bounds. While AOA's interest in the narrower aspects of the issue as to this particular District of Columbia Code provision may seem in some respects peripheral, AOA's interest in this Court's disposition of the case is strong.

SUMMARY OF ARGUMENT

Petitioners' position that the District of Columbia statute here involved is exempt from ERISA—and hence exempt from preemption by ERISA—finds abundant support in the language of the ERISA exemption relating to workmen's compensation laws. It is likewise supported by the Congressional policy underlying the exemption and by the well-reasoned opinion of the Second Circuit which the District of Columbia Circuit chose here to reject. The exemption—which was intended to preserve for the States an area traditionally regulated by the States—should not be given the grudging interpretation which the District of Columbia Circuit has arrived at. Accordingly the judgment should be reversed.

But in any event—whatever the result that may be reached by the Court on that question—the Court should carefully avoid any decision route which would impair or cast a cloud upon any of the State freedom of choice legislation. In the field of vision care for example, when a benefit plan covers certain services relating to eye conditions, the freedom of choice legislation prevents the plan from refusing to reimburse the employee who chooses to go to an optometrist instead of to an ophthalmologist. For a variety of reasons it is important that no preemption of such

legislation be read into the ERISA preemption clause. The Court should leave that matter fully open for consideration at some future date when the question does come before it directly.

ARGUMENT

I. Introductory

For more than a decade this Court and the lower courts have been wrestling with questions arising out of ERISA's rather complex, and by no means crystal-clear, preemption provision. Presumably Congressional clarification, if it could be obtained, would be welcome. But it has not been forthcoming, and meanwhile this Court and the lower courts have been proceeding on a case-by-case basis.

AOA's primary interest in this and comparable litigation is to help assure that, when the issue finally comes squarely before this Court (if it ever does), all of the State freedom of choice laws are sustained against any claim of ERISA preemption.[1] As ERISA

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[1] When *Blue Cross Hospital Service, Inc.* v. *Frappier* was remanded by this Court, 472 U.S. 1014 (1985), for further consideration in light of *Metropolitan Life*, supra, the Missouri Supreme Court disposed of the case by holding that, in the light of *Metropolitan Life*, it is clear that State freedom of choice statutes applicable to insured plans (such as the Missouri statute) come within ERISA's insurance savings clause and hence are not preempted by ERISA. *Blue Cross Hospital Service, Inc.* v. *Frappier*, 698 S.W. 2d 326 (Mo. 1985). Accord, *Blue Cross and Blue Shield of Kansas City* v. *Bell*, 798 F.2d 1331 (10th Cir. 1986), holding that the Kansas freedom of choice statute applicable to insured plans comes within ERISA's insurance savings clause and hence has not been preempted.

One subsequent appellate decision has held that ERISA

preemption law develops in the meantime, no needless impediment should be placed in the way of this sound ultimate result.

At the outset it should be noted that the freedom of choice laws are totally unlike the mandated-benefit law which was before this Court in *Metropolitan Life*. The State freedom of choice laws do not require that a health plan shall cover any particular illness or condition. They do not force upon a plan the coverage for this or that illness or condition. For example, the freedom of choice laws do not require that a plan cover vision care at all; and if the persons responsible for formulating the plan do wish to cover particular aspects of vision care, the freedom of choice laws do not dictate which types of eye diseases or eye conditions or eye examinations shall be covered or with what frequency such coverage may be availed of by the employee.

Instead, the freedom of choice laws consist of a vast body of State enactments, on the books in one or more forms in all 50 of the States and in the District of Columbia, which safeguard a patient's freedom of choice to select a provider of a particular health care service when the plan does cover the service. With respect to vision care coverage—if and to the extent that such coverage is actually provided for by an employee benefit plan—this means that there was and is pervasive State legislation requiring that the plan not refuse to reimburse the patient who pre-

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preempts an Alabama freedom of choice statute when reimbursement is sought under a self-insured employee benefit plan for services furnished by a chiropractor. *Mullenix* v. *Aetna Life & Cas. Ins. Co.*, 912 F.2d 1406 (11th Cir. 1990)—a case we submit was incorrectly decided.

fers to use the professional services of an optometrist (instead of a physician), as long as the services come within what may lawfully be performed by a licensed optometrist under the laws of the particular State. Moreover, the freedom of choice laws do not inflict on the benefit plans any additional costs in the vision care field; and indeed, practical experience has indicated that, on the whole, the costs of services performed by optometrists tend to be less than the costs of comparable services performed by ophthalmologists.

Throughout the Nation these freedom of choice statutory provisions have been enacted to assure to the patient his or her right of choice and, so far as vision care is concerned, to prevent discrimination against using the professional services of optometrists. The freedom of choice statutes represent deep-rooted policies of the States concerned, in a field normally governed by State law. Moreover, since optometrists usually are more widely dispersed geographically, and more conveniently located, within a State than are ophthalmologists, such legislation helps to assure that patients, particularly the elderly, will have greater access to convenient prepaid health care.[2]

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[2] In 1980, Congress expanded Medicare coverage to include services performed by optometrists in connection with the condition of aphakia. See 42 U.S.C. §1395x(r)(4), discussed in note 5 infra. In a 1976 Report recommending the adoption of this amendment, the Department of Health, Education and Welfare stated: "6. *Access to services.* Vision/eye care services for aphakic and cataract patients, as well as for patients more generally, can be made more accessible to the Medicare eligible population by providing reimbursement for services when provided by optometrists. In general, optometrists are more widely distributed

Accordingly, it is AOA's position that:

(1) State freedom of choice laws are outside the scope of ERISA's preemption clause fairly interpreted. This turns on a fair but not over-extravagant reading of the preempting phrase "all State laws insofar as they may now or hereafter relate to any employee benefit plan," in 29 U.S.C. §1144(a); and

(2) in any event, proper recognition should be given not only to the scope of ERISA's insurance savings clause, 29 U.S.C. §1144(b), as in *Metropolitan Life*, supra, but also to the scope of the express exemptions from ERISA, such as the exemption particularly involved in this case, where 29 U.S.C. §1003(b)(3) expressly exempts an employee benefit plan "maintained solely for the purpose of complying with applicable workmen's compensation laws."

We deal with the latter point first.

II. This District of Columbia Statute Comes Within ERISA's Workmen's Compensation Exemption Fairly Interpreted.

This question, on which the outcome of the case will likely turn, was extensively developed by

geographically and practice in many smaller communities where other vision/eye care practitioners are not available." U.S. Department of Health, Education and Welfare, *Report to Congress: Reimbursement Under Part B of Medicare For Certain Services Provided by Optometrists*, as required by Title I, Section 109, of P.L. 94-182 (July 1976), p. v. Similarly, in connection with a 1986 Medicare amendment eliminating discrimination against optometry (also discussed in note 5 infra) the House Committee Report stated: "Many beneficiaries are either foregoing covered eye care or are paying out-of-pocket for eye care services furnished by optometrists, because they do not have ready access to an ophthalmologist and because the present rules are too difficult to understand." H.Rept. 99-727, 99th Cong., 2d Sess., p. 81 (October 17, 1986).

petitioners in their petition for certiorari and in their reply to respondent's brief in opposition. Petitioners showed the strong support which their position derives from this Court's decision in *Shaw* v. *Delta Air Lines, Inc.*, 463 U.S. 85 (1983). They also had the support of the Second Circuit's well-reasoned decision in the comparable Connecticut case, *R. R. Donnelley & Sons Co.* v. *Prevost*, 915 F.2d 787 (1990), cert. denied 111 S.Ct. 1415 (1991)—a decision which the District of Columbia Circuit unfortunately rejected here. It is expected that petitioners will develop further in their brief on the merits their argument in support of the exemption, drawing on the statutory language and the manifest legislative purpose.

Without necessarily subscribing to every component of the petitioners' argument, we strongly support its main thrust and its conclusion. Express exemptions from Congressional legislation should be interpreted fairly, not grudgingly. The context is one where the purpose of the exemption clearly "forbids a narrow, cramped reading." *United States* v. *Alaska*, No. 118 Orig., decided April 21, 1992, 60 USLW 4315, 4318, quoting *United States* v. *Republic Steel Corp.*, 362 U.S. 482, 491(1960). This is particularly true in the ERISA domain, where certain areas previously subject to intensive State regulation and control have been taken over by federal mandate. The Court said as much in one of its early ERISA opinions, *Alessi* v. *Raybestos-Manhattan, Inc.*, 451 U.S. 504, 522 (1981):

> As we recently reiterated, "[p]reemption of state law by federal statute or regulation is not favored 'in the absence of persuasive reasons—either that the nature of the regulated

> subject matter permits no other conclusion, or that the Congress has unmistakably so ordained.'" [numerous citations omitted]

The Court has subsequently reiterated this well-settled principle on various occasions. E.g., *California* v. *ARC America Corp.*, 490 U.S. 93, 101 (1989); *Will* v. *Michigan Dept. of State Police*, 491 U.S. 58, 65 (1989). And, as the Court reminded us only the other day, "It is not lightly to be assumed that Congress intended to depart from a long established policy." *United States* v. *Wilson*, 503 U.S. ___ , 112 S.Ct. 1351, 1355 (1992), quoting *Robertson* v. *Railroad Labor Board*, 268 U.S. 619, 627 (1925). These are the principles which should carry the day in favor of sustaining the exemption here.

III. In Any Event, The Court Should Be Cautious Against Giving Undue Breadth To The ERISA Preemption Phrase "Relate To."

Metropolitan Life, supra, and its progeny have given broad scope to the ERISA preemption phrase—which preempts, with certain exceptions and subject to certain exemptions, "all State laws insofar as they may now or hereafter relate to any employee benefit plan." 29 U.S.C. §1144(a). See, e.g., *FMC Corp.* v. *Holliday*, 498 U.S. ___ , 111 S.Ct. 403, 407-408 (1990); *Ingersoll-Rand Co.* v. *McClendon*, 498 U.S. ___ , 111 S.Ct. 478, 484 (1990). But the Court has also made clear that "Notwithstanding its breadth, we have recognized limits to ERISA's pre-emption clause." *Ingersoll-Rand*, 111 S.Ct. at 483. Illustrative of these limits are the decisions in *Mackey* v. *Lanier Collection Agency & Serv.*, 486 U.S. 825 (1988), and *Fort Halifax Packing Co.* v. *Coyne*, 482 U.S. 1 (1987); see also *Shaw*, supra, 463 U.S. at 100 note 21 (1983).

Nothing in the Court's decisions to date has addressed the question whether the freedom of choice laws, with which AOA is especially concerned, do or do not come within the ERISA preemption clause. AOA urges that, no matter how this particular case involving a District of Columbia Code provision is decided, care be taken to avoid any intimation which might impair or cast a cloud on the validity of any of the widely-enacted State freedom of choice laws.

As has been noted, freedom of choice laws raise the question of what is the fair and reasonable interpretation of the word"relate" in ERISA's preemption clause. In our highly interdependent world, it can be argued that almost anything "relates" to almost anything else, and yet it must be clear that, as this Court has recognized, Congress could not have intended that the doctrine of preemption be carried to the utmost or even too far.

For example, it might be argued that a State law imposing general minimum safety standards for x-ray equipment, which would include equipment used in a clinic dedicated to examining and treating employees under a plan, is a law which "relates" to an employee benefit plan; yet it is hard to believe that anyone would take seriously a claim that ERISA preempts such a State law. For another example, a State law which imposes minimum fire safety standards on a facility made available to employees under a benefit plan could, arguably, be said to be a law which "relates" to the plan; but, again, the contention that ERISA preempts such a law would defy common sense.

In other words, it continues to be necessary, on a case-by-case basis, to find the appropriate place for

the ERISA preemption line to be drawn. In important decisions subsequent to *Metropolitan Life*, supra, this Court has made it clear that the question of where the line is to be drawn should turn not merely on the cumbersome statutory language but also on a fair consideration of the historical context, and of whether the Congressional purposes manifested in ERISA would be aided or subverted. Thus *Fort Halifax*, supra, held that a Maine statute mandating a one-time severance payment in the event of a plant closing did not "relate to any employee benefit plan." *Mackey*, supra, decided that ERISA does not preempt Georgia's general garnishment law and hence does not prevent creditors of ERISA welfare benefit plan participants from bringing garnishment proceedings against the plan in order to collect judgments against plan participants. In reaching this conclusion this Court said (486 U.S. at 834):

> state-law methods for collecting money judgments must, as a general matter, remain undisturbed by ERISA; otherwise, there would be no way to enforce such a judgment won against an ERISA plan. If attachment of ERISA plan funds does not 'relate to' an ERISA plan in any of these circumstances, we do not see how respondent's proposed garnishment order would do so.

The Court carefully distinguished this general garnishment law from a special exemption the Georgia legislature had enacted which applied solely to ERISA employee benefit plans and which exempted them from garnishment; that exemption statute the Court held was preempted since it was specifically designed to affect employee benefit plans (486 U.S. at 829-830). Indeed, it should be clear that even if the Court were to find it appropriate to conclude in the present case that the District of Columbia Code provision should be deemed to "relate" to employee benefit plans, such a conclusion would in no way pre-determine whether the State freedom of choice legislation so "relates."

A considerable segment of the State freedom of choice legislation relating to vision care—some of it pertaining to insured plans only, some of it pertaining to plans not incorporated into insurance policies, and some of it pertaining to both—was enacted during the 1960s, long before ERISA was passed in 1974.[3] Hence the total absence, in ERISA's legislative history, of any suggestion that Congress intended to preempt this mass of freedom of choice legislation, which was already well-known at that time, adds much weight to the other reasons for concluding that no such preemption has occurred. Compare *Dewsnup* v. *Timm*, 502 U.S. ___, 112 S.Ct. 773, 779 (1992).

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[3] Such freedom of choice legislation relating to vision care dating from the 1960s is to be found in at least 24 States—namely, Alabama, Arizona, California, Colorado, Hawaii, Idaho, Indiana, Maine, Maryland, Massachusetts, Michigan, Mississippi, Montana, Nebraska, New Hampshire, New Jersey, North Carolina, Oklahoma, Oregon, South Dakota, Tennessee, Utah, Washington, West Virginia—and from 1970 through 1973 in at least 10 additional States—namely, Arkansas, Florida, Kansas, Kentucky, Louisiana, Missouri, Nevada, New Mexico, New York, Virginia. (This is apart from the considerable body of freedom of choice legislation dating from those periods and relating to branches of health care other than vision care.) Accordingly, much of the freedom of choice legislation not only antedates the enactment of ERISA in 1974 (P.L. 93-406, September 2, 1974), but will be found well before 1970.

With respect to vision care, the freedom of choice laws are aimed at protecting people by assuring that more widespread vision care is available, by safeguarding the patient's freedom of choice, and indeed by discouraging monopolistic or restrictive practices—whether indulged in by insurance companies or by employers or by unions or by others. Such monopolistic practices would tend to channel away from optometrists, and in to physicians, the professional responsibility for and the revenue from the performance of vision care services which otherwise would flow to optometrists. Compare *Blue Shield of Virginia* v. *McCready*, 457 U.S. 465 (1982).[4]

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[4] In the event that the question of ERISA preemption of State freedom of choice laws were to be directly litigated, there are at least two additional independent grounds supporting AOA's position that no such preemption exists.

First, preemption of the State freedom of choice laws would impair the federal antitrust laws and hence, we would urge, is expressly forbidden by ERISA itself in 29 U.S.C. §1144(d), which provides that nothing in ERISA "shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States" (with certain specified exceptions not relevant here). Various employee benefit plans, both insured and self-insured, contain discriminatory and restrictive provisions having highly anticompetitive effects injurious to the public interest, which create lively and realistic opportunities for group boycotts and other seriously discriminatory practices. Such provisions offend not only the public policy and statutes of many States, but also the federal antitrust laws. *Blue Shield of Virginia* v. *McCready*, supra; accord, *Virginia Academy of Clinical Psychologists* v. *Blue Shield of Virginia*, 624 F.2d 476 (4th Cir. 1980), cert. denied 450 U.S. 916 (1981); *Wilk* v. *American Medical Ass'n*, 895 F.2d 352 (7th Cir. 1990), cert. denied 111 S.Ct. 513 (1990); compare *FTC* v. *Indiana Federation of Dentists*, 476 U.S. 447, 457-465 (1986). The freedom of choice laws stand as

This Court emphasized in *Fort Halifax*, supra, 482 U.S. at 11, that the Congressional purpose in adopting the preemption provision was to assist in achieving uniformity in the administration of an employee benefit plan having multi-state scope. In view of the fact that, with at most some minor variations, State freedom of choice legislation is universally present in the 50 States and the District of Columbia, no significant administrative diversity or complexity will be imposed by acknowledging that ERISA has not preempted any of the State freedom of choice statutes.[5]

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a bulwark against those who would otherwise commit serious violations of the federal antitrust laws. If ERISA were to be interpreted as preempting the State freedom of choice laws, it could hardly be doubted that there would be a serious impairment of the federal antitrust laws and of the policies which the federal antitrust laws espouse. Harmonious reading of ERISA as a whole should surely lead to the non-preemption result. Compare *Shaw*, supra, 463 U.S. at 102, holding that State fair employment laws are so important to the federal Title VII statute (of the Civil Rights Act of 1964) that such State laws are not preempted by ERISA.

For the second independent ground, see note 5, infra.

[5] With respect to the additional independent grounds supporting non-preemption (see note 4, supra), the second such ground is that preemption of the State freedom of choice laws would also impair the 1986 federal Medicare amendment relating to optometry, and hence for this additional reason is expressly forbidden by the same ERISA provision in 29 U.S.C. §1144(d) referred to in note 4, supra. Until the 1986 amendment, most services rendered by optometrists were not reimburseable under Medicare, even though applicable State law authorized optometrists to perform the services and such services when rendered by an ophthalmologist were reimburseable. However, the 1986 legislation amended Clause (4) of 42 U.S.C. §1395x(r), to put the services furnished by optometrists on a totally equal

AOA's position—which AOA urges should be fully protected against dilution or impairment—was further confirmed within Congress during the enactment of the ERISA amendments known as the Multiemployer Pension Plan Amendments Act of 1980, P.L. 96-364, codified as 29 U.S.C. §§1001a et seq. During the final stages of that bill's passage in the House, Congressman Thompson (who was Chairman of the House Subcommittee on Labor-Management Relations and was piloting the bill through the House debates and was later one of the House Managers in the Conference Committee) stated (126 Cong.Rec. 23042, August 25, 1980):

> "Finally, the distinguished gentleman from Texas, Representative Frost, has asked me to clarify the effect of ERISA's preemption provision on a state law requiring that health insurance contracts written in that state must provide covered persons the option to choose the specialist of their choice or must provide that the services of a particular specialist

footing, for Medicare reimbursement purposes, with those furnished by ophthalmologists, to the extent that the services fall within the lawful scope of the practice of optometry. Thus the amendment firmly established a federal statutory policy of nondiscrimination, patient freedom of choice, and equal treatment in the field of vision care. This federal statutory policy had been foreshadowed, with respect to the policy of nondiscrimination and freedom of choice, by two items of earlier legislation relating to federal employees (P.L. 93-363, adding what is now 5 U.S.C. §8902(k)); and P.L. 93-916, amending 5 U.S.C. §8101(2) and (3)), which were enacted in 1974 by the same Congress which enacted ERISA. The federal statutory policy is fully consistent with,and is based on comparable policy considerations as, the State freedom of choice laws.

> must be covered by the insurance contract if that patient chooses to go to that specialist. It is clear that ERISA does not preempt such a law, which does not require that particular benefits be provided and therefore does not cause any cost-creating State law conflicts that preemption was intended to prevent. For example, a State law requiring that podiatrist, chiropractor, or optometrist services be covered by health insurance contracts if a person chooses to have a particular service performed by a podiatrist, chiropractor, or an optometrist, is not preempted."

We recognize that the views of a later Congress on such matters are not necessarily controlling. See *Mackey*, supra, 486 U.S. at 839-840; *United States* v. *Monsanto*, 491 U.S. 600, 610 (1989). But the foregoing statement from the pertinent Congressional leadership furnishes strong confirmatory support to AOA's position on this precise issue. Compare *Gozlon-Peretz* v. *United States*, 498 U.S. ___ , 111 S.Ct. 840, 847 (1991).

CONCLUSION

For the reasons we have summarized, the judgment should be reversed. In any event—and no matter how this Court decides to deal with the issues raised—the Court is urged to avoid any decision route which would impair or cast a cloud upon any of the State freedom of choice legislation which is so important to the Nation's welfare.

Respectfully submitted,

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BRIEF OF THE STATE OF CONNECTICUT AND COMMONWEALTH OF MASSACHUSETTS *AS AMICI CURIAE* IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

In The

Supreme Court Of The United States

October Term, 1991

No. 91-1326

THE DISTRICT OF COLUMBIA
AND SHARON PRATT KELLY, MAYOR,

Petitioners,

v.

THE GREATER WASHINGTON BOARD OF TRADE,

Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the District of Columbia Circuit

BRIEF OF THE STATE OF CONNECTICUT AND COMMONWEALTH OF MASSACHUSETTS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF AMICI CURIAE

This brief is filed on behalf of the State of Connecticut and Commonwealth of Massachusetts as *amici curiae* pursuant to Supreme Court Rule 37.5.

The State of Connecticut has a direct interest in the outcome of the preemption issue before this Court. Con-

necticut has enacted Conn. Gen. Stat. § 31-284b, a workers' compensation statute similar to the District of Columbia Workers' Compensation Equity Amendment Act of 1990 ("Equity Amendment Act"). In *R.R. Donnelley & Sons Co. v. Prevost*, 915 F.2d 787, 791-94, (2d Cir. 1990), *cert. denied*, 111 S.Ct. 1415 (1991), the United States Court of Appeals for the Second Circuit concluded that § 31-284b was not preempted by ERISA. The Second Circuit's holding that Conn. Gen. Stat. § 31-284b was not preempted by ERISA was adopted by the Appellate Court of the State of Connecticut in *Tufaro v. Pepperidge Farm, Inc.*, 24 Conn. App. 234, 237, 587 A.2d 1044 (1991).

Subsequent to the *Donnelley* and *Tufaro* decisions, Conn. Gen. Stat. § 31-284b was amended by section 12 of Public Act No. 91-339. Conn. Gen. Stat. § 31-284b, as it now exists, does not differ in any significant respect from Conn. Gen. Stat. § 31-284b as it existed at the time of the *Donnelley* and *Tufaro* decisions.

Conn. Gen. Stat. § 31-284b, as amended by section 12 of Public Act 91-339, requires employers providing accident, health, and life insurance coverage, or welfare plan payments, to active employees, to continue such benefits, or their equivalent, for employees entitled to workers' compensation. Amici App. A1. Section 31-284b applies to all employers who provide accident, health, and life insurance benefits, whether or not the employer's plan is covered by the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001, *et seq.* Conn. Gen. Stat. § 31-284b, as amended by Public Act No. 91-339, § 12; Conn. Gen. Stat. § 31-275, as amended by Public Act No. 91-339, § 1(10), Amici App. A3. The stated purpose of the statute is "to maintain, as nearly as possible, the income of employees who suffer employment-related injuries. . . ."

Conn. Gen. Stat. § 31-284b, as amended by Public Act No. 91-339, § 12, Amici App. A1. Income is defined as "all forms of remuneration to an individual from his employment, including wages, accident and health insurance coverage, life insurance coverage and employee welfare plan contributions. . . ." *Id.* The statute does not impinge upon an employer's initial decision to provide such benefits. Rather, Conn. Gen. Stat. § 31-284b requires the continuation of benefits equivalent to those provided incident to employment to those employees suffering employment-related injuries.

Subsection (b) of § 31-284b provides four options by which an employer can meet its statutory obligation to continue benefits: (1) by purchasing insurance; (2) by "creating an injured employee's plan as an extension of any existing plan for working employees"; (3) by self-insuring; or (4) by combining as many of the above-mentioned methods as the employer may choose. Conn. Gen. Stat. § 31 284b(b), as amended by Public Act No. 91-339, § 12, Amici App. A1. The four optional methods of employer compliance provided in subsection (b) of § 31-284b clearly contemplate the creation of separately administered plans maintained solely to comply with the requirements of a state workers' compensation law. Subsection (c) of § 31-284b permits, but does not require, the additional option of continuing payments or contributions to an employee welfare plan, where the terms and conditions of the plan permit. Conn. Gen. Stat. § 31-284b(c), as amended by Public Act No. 91-339, § 12, Amici App. A1.

In addition to Connecticut's interest, the preemption issue to be decided in this case is of importance to all states. The states have a vital interest in the areas of workers' compensation, unemployment compensation and disability

insurance. The preemption analysis of the United States Court of Appeals for the District of Columbia Circuit frustrates Congress' intent of reserving those areas to the states.

SUMMARY OF ARGUMENT

The District of Columbia's workers' compensation law, the Equity Amendment Act, permits employer compliance by the establishment of plans separate from ERISA-covered plans. The Act does what this Court stated was authorized in *Shaw v. Delta Air Lines Inc.*, 463 U.S. 85 (1983). Thus, the Act is not preempted because of § 4(b)(3) of ERISA.

ARGUMENT

THE EQUITY AMENDMENT ACT IS NOT PREEMPTED BECAUSE OF § 4(b)(3), 29 U.S.C. § 1003(b)(3).

Section 514(a) of ERISA, 29 U.S.C. § 1144(a), expressly provides that ERISA "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) [§ 4(a)] of this title and not exempt under section 1003(b) [§ 4(b)] of this title." Section 4(b)(3) of ERISA, 29 U.S.C. § 1003(b)(3), exempts from ERISA coverage employee benefit plans "maintained solely for the purpose of complying with applicable workmen's compensation laws or unemployment compensation or disability insurance laws." The Equity Amendment Act, a workers' compensation law, is not preempted by virtue of § 4(b)(3) of ERISA. The Act does no more than that which this Court stated was permitted

in *Shaw v. Delta Air Lines Inc., supra.* "[W]hile the State may not require an employer to alter its ERISA plan, it may force the employer to choose between providing . . . benefits in a separately administered plan and including the state-mandated benefits in its ERISA plan." 463 U.S. at 108. The Second Circuit in *Donnelley, supra,* presented with a statutory scheme similar to that of the Equity Amendment Act, properly concluded under *Shaw* that such a statute is not preempted.

In *Shaw* this Court confronted the question whether ERISA preempted a New York Disability Benefits Law that required employers to pay sick-leave benefits to employees unable to work because of pregnancy or other non-occupational disabilities.[1] After finding that the statute "relate[d] to" employee benefit plans because it required employers to pay employees specific benefits, 463 U.S. at 97, the Court turned to the argument that the statute was exempt from preemption under § 4(b)(3). This Court first observed as a general rule that multibenefit plans containing both disability benefits as well as other benefits were subject to ERISA – and thus prevailed over state law – because such plans broadly served employee needs such as collective bargaining and were not maintained solely to comply with state law. *Shaw,* 463 U.S. at 106-07. In contrast, "separately administered plans" that "provide[] only those benefits required by the applicable state law" were exempt from ERISA coverage. *Id.* at 107-08.

This Court next dealt with the possibility that employers might circumvent state law entirely by adopting plans that combine disability benefits inferior to those required

[1] In *Shaw,* the Appellee Airlines' benefit plans were covered by ERISA. *Shaw,* 463 U.S. at 92.

by state law with other types of benefits. The Court's response was that states in the first instance may simply require an employer to maintain a disability plan complying with state law "as a separate administrative unit." Alternatively, states may permit employers to comply with State law by including state-mandated benefits in a multibenefit ERISA plan. *Shaw,* 463 U.S. at 108. As this Court put it, "while the State may not require an employer to alter its ERISA plan, it may force the employer to choose between providing disability benefits in a separately administered plan and including the state-mandated benefits in its ERISA plan." *Id.* This Court then reversed the Second Circuit's holding that New York was "not free at all" to enforce its disability statute against employers that provided disability benefits as part of multibenefit plans. *Id.*

Consistent with the reasoning of *Shaw,* the Equity Amendment Act places the burden on employers to choose the method of providing equivalent health insurance coverage. The Act does not require an employer or an ERISA trustee to maintain benefits within the confines of ERISA plans. An employer may comply with the Act by establishing separately administered plans. Any effect of the Equity Amendment Act on ERISA-covered plans is at the option of the employer. Under *Shaw,* the choice of the means of compliance with state workers' compensation, disability insurance, and unemployment compensation laws is left to the employer; the choice of compliance or noncompliance with these laws is not.

The District of Columbia Circuit's ruling that the Equity Amendment Act "relates to" ERISA-covered plans and is thus preempted conflicts with *Shaw.* Preemption by ERISA involves a two-step inquiry. In *Shaw,* the Court stated: "The issues are whether the Human Rights Law

and Disability Benefits Law 'relate to' employee benefit plans within the meaning of § 514(a) . . . *and, if so, whether any exception in ERISA saves them from preemption." Shaw,* 463 U.S. at 96 (emphasis supplied). Thus, a finding that a state law "relates to" ERISA-covered plans serves only to prompt the further inquiry whether any exception in ERISA saves the statute from preemption. The District of Columbia Circuit misread *Shaw. Shaw* makes clear that a state law of the type listed in § 4(b)(3) of ERISA is not preempted if the state law permits employer compliance by the establishment of plans separate from ERISA-covered plans. The Equity Amendment Act does precisely that.

CONCLUSION

For all the foregoing reasons, this Court should reverse the District of Columbia Circuit.

Respectfully submitted,

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APPENDIX OF *AMICI CURIAE*

APPENDIX TABLE OF CONTENTS

Public Act No. 91-339, § 12

Sec. 12. Section 31-284b of the general statutes, as amended by section 8 of public act 91-32, is repealed and the following is substituted in lieu thereof:

(a) In order to maintain, as nearly as possible, the income of employees who suffer employment-related injuries, any employer who provides accident and health insurance or life insurance coverage for any employee or makes payments or contributions at the regular hourly or weekly rate for full-time employees to an employee welfare [fund, as defined in section 31-53,] PLAN shall provide to the employee equivalent insurance coverage or welfare [fund] PLAN payments or contributions while the employee is eligible to receive or is receiving compensation pursuant to this chapter, or while the employee is receiving wages under a provision for sick leave payments for time lost due to an employment-related injury. As used in this [subsection] SECTION, "income" means all forms of remuneration to an individual from his employment, including wages, accident and health insurance coverage, life insurance coverage and employee welfare plan contributions AND "EMPLOYEE WELFARE PLAN" MEANS ANY PLAN ESTABLISHED OR MAINTAINED FOR EMPLOYEES OR THEIR FAMILIES OR DEPENDENTS, OR FOR BOTH, FOR MEDICAL, SURGICAL OR HOSPITAL CARE BENEFITS.

(b) An employer may provide such equivalent accident and health or life insurance coverage or welfare [fund] PLAN payments or contributions by: (1) Insuring his full liability under this section in any stock or mutual companies or associations that are or may be authorized to take such risks in this state; (2) creating an injured employee's

plan as an extension of any existing plan for working employees; (3) self-insurance; or (4) by any combination of the methods provided in subdivisions (1) to (3), inclusive, of this subsection that he may choose.

(c) In the case of an employee welfare [fund] PLAN, an employer may provide equivalent protection by making payments or contributions for such hours of contributions established by the trustees of the employee welfare [fund] PLAN as necessary to maintain continuation of such insurance coverage when the amount is less than the amount of regular hourly or weekly contributions for full-time employees.

(d) In any case where compensation payments to an individual for total incapacity under the provisions of section 31-307, as amended by section 23 of [this act] PUBLIC ACT 91-32 AND SECTION 26 OF THIS ACT, continue for more than one hundred four weeks, the cost of accident and health insurance or life insurance coverage after the one hundred fourth week shall be paid out of the second injury fund in accordance with the provisions of section 31-349, as amended by section 35 of [this act] PUBLIC ACT 91-32 AND SECTION 36 OF THIS ACT.

(e) Accident and health insurance coverage may include, but shall not be limited to, coverage provided by insurance or directly by the employer for the following health care services: Medical, surgical, dental, nursing and hospital care and treatment, drugs, diagnosis or treatment of mental conditions or alcoholism, and pregnancy and child care.

Public Act No. 91-339, §1 (10)

Section 1. Section 31-275 of the general statutes, as amended by section 1 of public act 91-32, is repealed and the following is substituted in lieu thereof:

As used in this chapter and in sections 10 to 14, inclusive, of [this act] PUBLIC ACT 91-32, unless the context otherwise provides:

(10) "Employer" means any person, corporation, firm, partnership, voluntary association, joint stock association, the state and any public corporation within the state using the services of one or more employees for pay, or the legal representative of any such employer, but all contracts of employment between an employer employing persons excluded from the definition of employee and any such employee shall be conclusively presumed to include the following mutual agreements between employer and employee: (A) That the employer may accept and become bound by the provisions of this chapter by immediately complying with section 31-284, as amended by section 7 of [this act] PUBLIC ACT 91-32 AND SECTION 11 OF THIS ACT; (B) that, if the employer accepts the provisions of this chapter, the employee shall then be deemed to accept and be bound by such provisions unless the employer neglects or refuses to furnish immediately to the employee, on his written request, evidence of compliance with section 31-284, as amended by section 7 of [this act] PUBLIC ACT 91-32 AND SECTION 11 OF THIS ACT, in the form of a certificate from the commissioner, the insurance commissioner or the insurer, as the case may be; (C) that the employee may, at any time, withdraw his acceptance of, and become released from, the provisions of this chapter by giving written or printed notice of his with-

drawal to the commissioner and to the employer, and the withdrawal shall take effect immediately from the time of its service on the commissioner and the employer; and (D) that the employer may withdraw his acceptance and the acceptance of the employee by filing a written or printed notice of his withdrawal with the commissioner and with the employee, and the withdrawal shall take effect immediately from the time of its service on the commissioner and the employee. The notices of acceptance and withdrawal to be given by an employer employing persons excluded from the definition of employee and the notice of withdrawal to be given by the employee, as provided in this subsection, shall be served upon the commissioner, employer or employee, either by personal presentation or by registered or certified mail. In determining the number of employees employed by an individual, the employees of a partnership of which he is a member shall not be included. A person who is the sole proprietor of a business or who is a partner in a business may accept the provisions of this chapter by notifying the commissioner, in writing, of his intent to do so. If such person accepts the provisions of this chapter he shall be considered to be an employer and shall insure his full liability in accordance with subdivision (2) of subsection (b) of section 31-284, as amended by section 7 of [this act] PUBLIC ACT 91-32 AND SECTION 11 OF THIS ACT. Such person may withdraw his acceptance by giving notice of his withdrawal, in writing, to the commissioner.

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BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES — Page

TABLE OF AUTHORITIES—Continued

Page

STATUTES

TABLE OF AUTHORITIES—Continued

IN THE
Supreme Court of the United States
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This brief *amicus curiae* of the American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO"), a federation of 90 national and international unions with a total membership of approximately 14,000,000 working men and women, is filed with the consent of the parties and in support of petitioners, as provided for in the Rules of this Court.

INTRODUCTION AND SUMMARY OF ARGUMENT

In *Shaw v. Delta Airlines*, 463 U.S. 85 (1983), the Court summarized the portion of the Employee Retirement Security Act of 1974 ("ERISA") pertinent to determining the interplay between the federal statute and state law as follows:

The federal Employee Retirement Income Security Act of 1974, 88 Stat. 829, as amended, 29 U.S.C. § 1001 et seq. (1976 ed. and Supp. V) subjects to federal regulation plans providing employees with fringe benefits. ERISA is a comprehensive statute designed to promote the interests of employees and their beneficiaries in employee benefit plans . . . The term "employee benefit plan" is defined as including both pension plans and welfare plans. The statute imposes participation, funding and vesting requirements on pension plans. 201-306, 29 U.S.C. §§ 1051-86 (1976 ed. and Supp. V). It also sets various uniform standards, including rules concerning reporting, disclosure and fiduciary responsibility, for both pension and welfare plans. 101-111, 401-414, 29 U.S.C. §§ 1101-1114 (1976 ed. and Supp. V). ERISA does not mandate that employers provide any particular benefits. . . .

Section 514(a) of ERISA, 29 U.S.C. § 1144(a), preempts "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan" covered by ERISA. . . [Section] 4(b)(3) of ERISA, 29 U.S.C. § 1003(b)(3) exempts from ERISA coverage employee benefits plans that are "maintained solely for the purpose of complying with applicable workmen's compensation laws or unemployment compensation or disability insurance laws." [463 U.S. at 90-91 (footnotes omitted)].[1]

The immediate preemption question raised by this case is whether a statute such as the Equity Amendment Act —a District of Columbia statute that requires employers to provide, as part of the benefits payable under the District's workers compensation statute, health benefits equivalent to those included in the employer's own health benefit plan—is preempted by ERISA.

The D.C. Circuit viewed that question—properly, in our view, for reasons delineated in Part 1, *infra*—as

[1] There are also a number of explicit exceptions to the preemptive force of § 514(a), none of them directly pertinent here. *See* ERISA §§ 514(b) and (d), 29 U.S.C. §§ 1144(b) and (d).

turning *not* upon the proper interpretation of ERISA § 4(b)(3)'s "workers compensation" plan exemption, but upon the proper interpretation of the "relates to" language of ERISA § 514(a), the affirmative preemption provision.

The D.C. Circuit then stated three reasons why, in its view, the Equity Amendment Act "relate[s] to" employee health benefit plans within the meaning of ERISA §514(a) and is therefore preempted: (1) "by requiring that . . . new benefits be 'equivalent' to those already provided under an existing covered plan" (*Greater Washington Bd. of Trade v. District of Columbia*, 948 F.2d 1317, 1322); (2) "by defining the employers who are obliged to provide . . . new benefits as those who already provide benefits under a covered plan" (*id.*); and (3) by reason of "the additional financial burden associated with an increase in ERISA health benefits, an employer might choose to forego such an increase altogether" (*id.* at 1325).

The argument that follows is devoted to demonstrating that the D.C. Circuit erred in regarding any of these three intersections between the Equity Amendment Act and an ERISA-covered health benefit plan as a sufficient "relationship" to that plan to invoke ERISA § 514(a) preemption.

1. This Court has both stated that the term "relates to" in ERISA § 514(a) is a broad one and recognized that certain state law connections with or references to ERISA-covered employee benefit plans do *not* suffice to constitute the required relationship. Although at earlier stages of the process of litigating elucidation, the Court has declined to delineate the precise line separating those two classes of state laws, it is now time to do so.

2. Before proceeding to discuss the line-drawing issue, we explain, in Part 1, *infra*, why the reach of the § 514(a) "relates to" standard is in fact the determi-

native issue here. In describing the preemptive scope of ERISA, § 514(a) refers to the § 4(b) coverage exemptions. Section 514(a) includes this cross-reference to conform the coverage and preemption provisions of the statute by assuring that state laws are *not* preempted because of their impact upon exempted plans *alone*. The D.C. Circuit's preemption conclusion turned not on the relationship between the Equity Amendment Act and ERISA-exempt workers' compensation plans, but upon the interaction between the Equity Amendment Act and nonexempt health benefits plans. Thus, as the court below correctly understood, this case, at bottom, turns on the scope of ERISA's preemption provision, standing alone, not on the relationship between ERISA §§ 514(a) and 4(b).

3. Surveying both the ERISA legislative materials and this Court's ERISA preemption case law, it becomes apparent that Congress meant to preempt the class of state laws that *either* are specifically designed to affect ERISA-covered employee benefit plans particularly or that, while not so designed, in fact have a substantial and unavoidable impact upon the operation of such plans.

4. Under that dual standard, the interaction between the Equity Amendment Act and respondent's ERISA-covered health benefit plan does not rise to level of an ERISA § 514(a) relationship. Indeed, that interaction is most similar to the connection between ERISA-covered employee benefit plans and state law damages calculations where replacement of lost compensation is at issue. In both instances, the only possible impacts upon the actual operation of the ERISA-covered plans is that the employer could possibly be influenced by the economic consequences of the state law to alter the shape of its ERISA plan. Purely speculative economic effects of that kind are simply too tenuous to sustain preemption under § 514(a).

ARGUMENT

1. *The Necessity for Line Drawing:*

In *Shaw v. Delta Airlines*, *supra*, this Court noted that "[a] law 'relates to' an employee benefit plan, in the normal sense of the phrase, if it has a connection with or reference to such a plan" and that "Congress used the words 'relate to' in § 514(a) in [this] broad sense." 463 U.S. at 96-98. At the same time, *Shaw* recognizes that some "state actions . . . affect employee benefit plans in too tenuous, remote, or peripheral a manner to warrant a finding that the law 'relates to' the plan," but declined at that juncture to "express . . . views about where it would be appropriate to draw the line." 463 U.S. at 100 n.21. "Relates to," in sum, is a broad, but not a limitless, term; not every "connection" and not every "reference" constitutes a § 514(a) relationship.

Since *Shaw*, this Court has had seven additional occasions to consider ERISA preemption issues. The opinions in the post-*Shaw* cases continue to repeat *both Shaw's* "connection with or reference to such a plan" language *and* the concomitant observation that some "connections with" or "references to" ERISA employee benefit plans are too insubstantial to "relate to" a covered plan within the meaning of § 514(a). *See, e.g.*, most recently, *Ingersoll-Rand Co. v. McClendon*, —— U.S. ——, 111 St. Ct. 478, 483 (1990); *see also*, summarizing and relying upon the ERISA preemption cases in construing another statute, *Morales v. Trans World Airlines Inc.*, S. Ct. No. 90-1694, slip op. at 14 (June 1, 1992). And the Court has on several occasions implicitly, and on one occasion explicitly, held that there was *no* ERISA preemption despite *some* connection between a state law and employee benefit plans. *See Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1 (1987), and *Mackey v. Lanier Collection Agency & Service, Inc.*, 486 U.S. 825, 829 (1988).

None of these cases, however, marks with precision the line between connections supporting a preemptive result

and those too weak to warrant such a result. Because the real world of economic transactions creates an endless webb of connections, because state law regulates so many facets of these transactions, and because employee benefit plans are ubiquitous as a form of compensation in modern places of employment, the result has been an epidemic of ERISA preemption litigation.[2] Given the inherent tension between the two parts of *Shaw's* formulation of the ERISA preemption standard and the lack of subsequent guidance, the lower courts have tended to take a mechanistic approach to ERISA preemption that depends more on plucking boilerplate phrases at random from this Court's decisions than on reasoned statutory analysis.[3]

Until the limiting principles that place a particular legal rule in the overall structure of the law are enunciated, the rule's reach tends to expand incrementally until "the aggregate or end result is one that would never seriously have been considered in the first instance." *United States v. 12 200-Ft. Reels of Super 8mm. Film*, 413 U.S. 123, 127 (1973). In this instance, application of *Shaw's* "connection with or reference to" catchall formulation without due regard to this Court's repeated admonition that not all connections and not all references

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[2] An April, 1992 Lexis search for ERISA preemption cases turned up 400 cases in the federal district and circuit courts and the state appellate courts in 1991 and 1992 alone.

[3] In other instances, federal courts of appeals have made thoughtful and sensible attempts to develop a principaled approach to the linedrawing problem by collecting and categorizing decided ERISA preemption cases on each side of the dim *Shaw* line. *See, e.g., Memorial Hos. System v. Northbrook Health Ins.*, 904 F.2d 236 (5th Cir. 1990); *Aetna Life Ins. v. Borges*, 869 F.2d 142 (2d Cir.), *cert. denied*, —— U.S. ——, 110 S. Ct. 57 (1989); *Arkansas Blue Cross & Blue Shield v. St. Mary's Hospital*, 947 F.2d 1341 (1991); *Martori Bros. Distributors v. James-Massengale*, 781 F.2d 1349, *amended*, 791 F.2d 799 (9th Cir.), *cert. denied*, 479 F.2d 149 (1986).

suffice has yielded results that cannot possibly be justified if one returns to the cases and considers the legislative materials afresh. *See* pp. 13-16, *infra*.[4]

For all these reasons, the corpus of ERISA preemption law has now reached the stage of "gestative propensity that calls for the 'line drawing' familiar in the judicial . . . process: "thus far, but not beyond." *12 200-Ft. Reels, supra*, 413 U.S. at 127. The Court in this case should therefore begin to delineate the line distinguishing

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[4] The circumstances of a few of these cases illustrates some of the anomalous results the lower courts are reaching.

Cromwell v. Equicor-Equitable HCA Corp., 944 F.2d 1272 (6th Cir. 1991), for example, holds preempted by ERISA suits by medical care providers against health benefit plans where the provider performed service to a patient in reliance upon erroneous information from the plan that the employee was covered for the services provided. Yet, because there is no cause of action under ERISA itself by which the provider can recover, the result is to displace well-developed common law rules concerning accountability for one's actions, to the detriment of a third party who is outside the employee benefit plan. *See* 944 F.2d at 1279 (Jones, J., dissenting) (contending that generally lower court ERISA preemption cases suffer from "an overzealous readiness in the federal courts to bar all state-law claims which even smell of ERISA . . . without engaging in the complex case-by-case analysis which the statute and precedent require," with the result that "such a boiler-plate unreflective approach to ERISA preemption . . . frequently leave[s] deserving claimants without recourse in state or federal court."). *Cf. Hospice of Metro Denver v. Group Health Ins. of Oklahoma*, 944 F.2d 752 (1991) (same issue, opposite result on the doctrinally irrelevant basis that no ERISA remedy is available to the health care provider).

Similarly, several courts have held that where an employer promises, as part of an individual employment contract, that certain benefit plans will be maintained, the employee has no state cause of action for breach of the employment contract if the plans are not in fact maintained, even if the result is to leave the employee with *no* remedy at all for the employer's breach of his explicit promise. *See, e.g., Bartholet v. Reishauer A.G.*, 953 F.2d 1073 (7th Cir. 1991); *Smith v. Dunham-Bush, Inc.*, 959 F.2d 6 (2nd Cir. 1992).

the circumstances in which a state law may be said to "relate to" an ERISA employee benefit plan within the meaning of the statute from those circumstances in which there is *some* connection between the state law and benefit plans, but that connection is too insubstantial to warrant displacing state authority.

In particular, the Court should make clear (1) that, as several lower court cases have held, it is *not* a "relationship" for ERISA preemption purposes that a state law takes into account in establishing a non-ERISA requirement the terms of an ERISA employee benefit plan; and (2) that it is *not* a "relationship" for ERISA preemption purposes that a state law imposes on employers a non-ERISA requirement that may have some impact upon an employee's economic decisions regarding its ERISA-covered plans.

2. The Relevance of the ERISA § 4(b)(3) Exception:

Before turning to the ERISA § 514(a) issue that is at the core of this case, we pause to explain why the D.C. Circuit was correct in holding that this case turns upon the reach of § 514(a)'s "relates to" language, and not on the relationship between §§ 514(a) and 4(b).

(a) Workers' compensaion benefit plans—like the disability benefit plans involved in *Shaw* and like unemployment compensation benefit plans—*are* "employee welfare benefits plans" within the meaning of ERISA's definitional and coverage provisions. *See* §§ (3)(1) and (4)a, 29 U.S.C. §§ 1002(1) and 1003(a). Specifically, § 3(1), 29 U.S.C. § 1002(1), defines "employee welfare benefit plan" as including, *inter alia*, plans providing sickness, accident, or disability benefits, of which workers' compensation benefits are a variety; and § 4(a), 29 U.S.C. § 1003(a), describes as covered by ERISA "any" employee welfare benefit plan established or maintained by an employer, and employe organization, or both.

ERISA § 514(a), in turn, preempts state laws "insofar as they . . . relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title." 29 U.S.C. § 1144(a). Thus, if that were all there were to the matter, § 514(a) would preempt state laws mandating workers compensation plans. *See Fort Halifax Packing Co. v. Coyne*, *supra*, 482 U.S. at 12 (noting that *Standard Oil Co. of California v. Agsalud*, 633 F.2d 760 (9th Cir. 1980), *summarily aff'd*, 454 U.S. 801 (1981) held, correctly, that a state employee benefit plan *is* preempted by § 514(a)).

Section 514(a) goes on to say that state laws relating to employee benefit plans that are "exempt under § 1003(b)" are not preempted. Plans "maintained solely for the purpose of complying with applicable. . . workers' compensation laws" are exempt from ERISA coverage under § 4(b)(3), 29 U.S.C. § 1003(b)(3). The plain language of § 514(a), then, provides that there is *no* preemption of a state law simply because the law "relates to" a § 4(b)(3) exempt workers' compensation plan.

The purpose of the reference in § 514(a) to plans "exempt under § 1003(b) of this title," then, is to conform the preemption and coverage provisions of the statute's text.[5] In particular, the § 1003(b) cross-reference assures that the very state laws that would otherwise insulate § 4(b)(3) plans from affirmative ERISA coverage are not preempted.

The syntax of ERISA § 514(a), however, makes lucid that state laws *are* preempted insofar as the laws "re-

[5] The conforming language is structurally necessary because, as this Court opined in *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 523 n.20 (1981), "ERISA's plain language . . . preempts not plans, but 'State laws.'" Section 4(b), on the other hand, exempts from ERISA coverage generally not state laws but certain plans. *Id.* Thus, § 4(a), which exempts § 4(b) *plans* from the affirmative coverage of ERISA's substantive provisions, would not, absent some explicit statement in that regard, exempt *laws* relating to those plans from the ERISA preemption provisions.

late to" ERISA employee benefit plans *not* exempt from ERISA coverage under § 4(b), whether or not the state law also relate to exempt plans.[6]

(b) Accordingly, in *Shaw*, this Court, addressing the validity of a state law that mandated certain disability benefit provisions, applied just this understanding of ERISA § 514(a):

First, the *Shaw* Court held that the disability benefit law in question did " 'relate to' an employee benefit plan" within the meaning of ERISA § 514(a) because the state law "requires employers to pay employees certain benefits." 463 U.S. at 96-97.

Second, *Shaw* determines that the state statute is nonetheless *enforceable* with respect to an employer disability benefit plan that "provides only those benefits required by the applicable state law," because of the exclusion from preemption for laws relating to plans exempt from ERISA under § 4(b). 463 U.S. at 107.

At the same time, the Court in *Shaw* held the state statute unenforceable insofar as it *required* that employers provide certain disability benefits within "benefit plans [that] . . . provide benefits not required by that law." 463 U.S. at 106-107. "[T]hose portions of the Airlines' multibenefit plans maintained to comply with the Disability Benefits Law. . . are not exempt from ERISA and are not subject to state regulation." *Id.* at 107. While "[a] State may

[6] The statute, for example, could have provided, but does not, that ERISA supersedes state laws "insofar as they . . . relate to any employee benefit plan described in § 4(a)" but "shall not supersede any law relating to any employee benefit plan exempt under § 4(b)." In that event, the statutory language would have been ambiguous with regard to state laws bearing the requisite relationship to *both* ERISA-covered and non-ERISA covered employee benefit plans. As actually drafted, however, the language negates any possible ambiguity, by making clear that the requisite relationship to an ERISA-covered benefit plan is sufficient, without regard to any additional relationship to a non-covered benefit plan.

require an employer to maintain a disability plan complying with state law as a separate administrative unit" (*id.* at 108, emphasis supplied), a state may only permit, but not require, an employer to comply with state law by including mandated disability benefits *within an ERISA-covered plan* (*id.*).

(c) The D.C. Circuit's understanding of this aspect of *Shaw* was not strictly accurate: The court of appeals said that "[t]he key issue in distinguishing *Shaw* from this case is that the Court in *Shaw* never found that the New York Disability Benefits Law related to an *ERISA-covered plan*." 948 F.2d at 1323 (emphasis in original). In fact, as recounted above, this Court *did* find that the New York disability law "related to" an *ERISA-covered* plan insofar as New York required that employee benefit plans providing benefits *other* than those mandated by state law also provide mandated disability benefits.

That infelicity aside, the D.C. Circuit got the threshold point right. Insofar as *Shaw upheld* the New York Disability Law, it was because "[t]he [only] plan to which the New York Disability Benefits Law related *was* exempt, so the law did not qualify at the threshold for preemption." 948 F.2d at 1323.[7]

Nothing in *Shaw*, then, insulates from ERISA's preemptive reach state laws that relate to *both* ERISA-covered employee benefit plans and benefit plans exempt from ERISA coverage under § 4(b). The outcome of this case, then, turns upon whether or not the points of intersection between the Equity Amendment Act and ERISA-covered health benefit plans constitute, as the D.C. Circuit held, a sufficient relationship between the statute and those plans to trigger ERISA § 514(a) preemption.

[7] As we note below (at p. 16), under this analysis, the Court in *Shaw* necessarily held there is *not* a sufficient relationship to trigger preemption where the State provides a non-ERISA compliance option, but also permits compliance through an ERISA-covered plan.

3. *The Reach of ERISA § 514(a) Preemption Generally:*

Shaw considered not only ERISA § 4(b)(3) and the interaction of that provision with ERISA § 514(a) provisions, but also addressed the correct interpretation of § 514(a) standing alone.

(a) *Shaw* concerned two state laws, one the Disability Benefits Law discussed above, mandating the payment of certain benefits from employee benefit plans, the other a state law prohibiting pregnancy-based discrimination in employee benefits plans. The state statutes, then, directly and substantially controlled the operation of employee benefits plans (although not necessarily, as discussed above, ERISA-covered employee benefit plans), by mandating in certain respects how those plans are to operate. 463 U.S. at 97 ("the Human Rights Law . . . prohibits employers from structuring their employee benefits in a manner that discriminates on the basis of pregnancy, and the Disability Benefit Law, . . . requires employers to pay employees specific benefits.")

Shaw concluded that the relationship between each of these two statutes and ERISA-covered benefit plans comes within the preemptive reach of § 514(a). In coming to that conclusion, the Court considered and rejected two specific arguments limiting the reach of § 514(a). Those arguments set the context in which *Shaw's* "connection with or reference to" standard was first enunciated.

First, the state in *Shaw* maintained that "§ 514(a) . . . preempt[s] only state laws specifically designed to affect employee benefit plans." 463 U.S. at 98. Because "[i]t would have been unnecessary to exempt generally applicable state criminal statutes from preemption. . . if § 514(a) applied only to state laws dealing specifically with ERISA plans," and because ERISA § 514(b)(4) states just such an express affirmation of state criminal law authority, the Court rejected that contention. At the same time, there is nothing in *Shaw* embracing the converse proposition, that whenever a state statute *does* men-

tion employee benefit plans in a way that includes ERISA-covered plans, that state statute is, without more, pre-empted.

Second, on the basis of the legislative history of § 514(a), *Shaw* disavowed New York's suggestion that ERISA "can . . . be interpreted to pre-empt only state laws dealing with the subject matters covered by ERISA —reporting, disclosure, fiduciary responsibility, and the like." 463 U.S. at 98.

That history showed that earlier versions of ERISA's preemption provisions would have superseded state laws "relat[ing] to" only the particular aspects of employee benefit plans regulated by ERISA. As the legislative process went forward the locution of the requisite pre-emptive intersection between the federal law and state laws—"related to"—remained unchanged. *See* 463 U.S. at 98 n.18. But as the legislation progressed, the class of state laws that were to be preempted was enlarged to include not only state laws that regulate benefit plans in the same way ERISA regulates such plans—in the case of employee welfare benefit plans by requiring reporting, disclosure, imposing fiduciary responsibility, and providing certain remedial provisions—but also state laws generally regulating benefits plans.[8]

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[8] The language of ERISA § 514(a), on its face, does not unmistakably indicate that broad "field" preemption is intended. Unlike the preemption language in some other statutes, § 514(a) does *not* flatly prohibit the enactment or enforcement of state laws within a given field of application. *Compare, e.g.*, 49 U.S.C. § 1305(a)(1) ("no State . . . shall enact or enforce any law, rule, regulation, standard or other provision having the force and effect of law relating to rates, routes, or services of any air carrier"); *see also Morales v. Trans World Airlines, supra*, construing that section as broadly preemptive, in reliance on the ERISA preemption cases.

Instead, § 514(a) provides that "the provisions of this title and title IV shall *supersede* any and all State laws" relating to ERISA-covered employee benefit plans. (Emphasis supplied). Read without regard to the legislative history, one could well have concluded that a federal statutory "provision" can "supersede" a state law only

Thus, in every instance, the members of Congress who managed the bill in the House and the Senate, quoted in *Shaw*, described the final, conference version of § 514(a) as preempting state actions specifying in some manner *requirements* for the operation of ERISA plans, not as preempting laws which merely mention ERISA plans or have some derivative impact on those plans or on employer behavior with respect to those plans. For example, Representative Dent, in the passage quoted in *Shaw*, stressed that the conference version of § 514(a) was intended to assure "the reservation to Federal authority [of] the sole power to *regulate* the field of employee benefit plans . . . by eliminating the threat of conflicting and inconsistent State and local regulation." 463 U.S. at 99, *quoting* 120 Cong. Rec. 29197 (1974) (emphasis supplied). Similarly, Senator Williams referred to an intention "to preempt the field for Federal regulations, thus eliminating the threat of conflicting or inconsistent State and local *regulation*." *Id.*, *quoting* 120 Cong. Rec. at 29933 (emphasis supplied). And Senator Javits said that § 514(a) addresses "the desirability of further *regulation* —at either the State or Federal level." *Id.* at 99 n.20, *quoting* 120 Cong. Rec. 29942 (1974) (emphasis supplied); *see also* Senator Javits' comment, in a colloquy not quoted in *Shaw*, that with respect to plans providing prepaid legal services "it is intended that State regulation—but not bar association ethical rules, guidelines, or disciplinary actions" be preempted, Legislative History of ERISA, 4789 (Sen. Labor Sub. Print, 1976); *id.* ("the State, directly or indirectly through the bar, is preempted

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insofar as there is the particular federal provision covers an issue addressed by that state law; under this view, where there is no ERISA provision available to override a state law on a common subject, the state law could be enforced.

Consequently, *it is ERISA legislative history*, not the statutory language standing alone, that provides the requisite evidence that broad field preemption was intended, and that indicates the limitations of that broad field preemption as well.

from *regulating* the form and content of a legal service plan") (emphasis supplied).

Shaw in two respects recognizes, moreover, that the "relate to" connection must ordinarily be one pursuant to which the state law substantially and necessarily affects ERISA-covered employee benefit plans and that a mere contingent impact, a simple mention, or remote, derivative effect is *not* an ERISA § 514(a) relationship.

First, as noted above, *Shaw* explicitly states that "[s]ome state actions may affect employee benefit plans in too tenuous, remote, or peripheral a manner to warrant a finding that the law 'relates to' the plan." 463 U.S. at 100 n.21. The very locution used—that § 514(a) concerns "state actions" that "affect" employee benefit plans—demonstrates that there must, at a minimum, be *some* impact on the plan because of the state action; state laws that mention or refer to employee benefit plans not in order to affect the plans but in order to accomplish some other end plainly do not come within this language.

Second, *Shaw* necessarily—although without directly so acknowledging—approved as *not* "relating to" an ERISA-covered employee benefit plan a state statute that provides employers with the *option* of complying by altering an ERISA-covered plan, or by creating a free-standing, non-ERISA covered compliance scheme.[9] A valid state disability benefits statute, according to *Shaw*, could permit, but not require, compliance through inclusion of mandatory disability benefits in an ERISA-covered plan. Presumably, such a statute, or its implementing regulations or adjudicatory decisions, would have to so state, so that employers could be aware that this option exists.

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[9] The D.C. Circuit opinion in this case missed this point because that court misunderstood the factual context of *Shaw*. *See* p. 6, *supra*. Since the D.C. Circuit was erroneously of the view that no ERISA-covered employee benefit plan was at issue in *Shaw*, that court did not recognize that the Disability Benefits Law in *Shaw*, as upheld, *did* have *some* connection to an ERISA-covered plan.

Shaw, therefore, necessarily determined that the state law under attack would *not* "relate to" the ERISA-covered plan simply because the state statute *mentions* the possibility of compliance through that plan, or because the state permitted employers, on an *optional* basis, to substitute compliance through an ERISA-covered plan for compliance through an option not within ERISA's coverage.

Put another way, had those tenuous connections to ERISA-covered plans been sufficient to bring a state law within the "relate to" language of § 514(a), *Shaw* could not have allowed the state to "force the employer to choose between providing disability benefits in a separately administered plan and including the state-mandated benefits in its ERISA plan." 463 U.S. at 108; *see also id.* at 109 ("[w]e further hold that the Disability Benefits Law is not preempted by ERISA, although New York may not enforce its provisions through *regulation* of ERISA-covered benefit plans.")

In short, *Shaw* cannot fairly be read as holding interactions between employee benefit plans and state laws of the weak kind relied upon by the D.C. Circuit here are sufficient to constitute a § 514(a) relationship. To the contrary, the *Shaw* opinion and the legislative history upon which the opinion relies is that Congress intended the broad reach of § 514(a) to extend to all state laws with an impact upon the internal operation of employee benefit plans that is both substantial and unavoidable.

(b) The results and analyses in all the post-*Shaw* decided cases are consistent with the basic standard just set forth with one caveat: The Court has evolved a special rule for those *sui generis* state laws that are expressly designed to affect ERISA-covered employee benefit plans *alone*. Taking motive as sufficient to demonstrate effect, the Court has in those instances not inquired into either the actual impact of the statute or whether that impact

is avoidable, but has instead declared such statutes preempted, without more.

(i) *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724 (1985)—the next case after *Shaw* in the ERISA preemption line—and *Pilot Life Ins. v. Dedeaux*, 481 U.S. 41 (1987) (which is analytically indistinguishable from *Metropolitan Life* for present purposes) involved state laws substantially affecting whether or not employee benefit plans generally (but not ERISA-covered benefit plans particularly) are required to pay benefits under certain circumstances.[10] The state action in each instance could be said to effect benefit plans "indirectly" (*Metropolitan Life Ins. Co.*, 471 U.S. at 739), rather than directly, but only in the sense that the state rule in question was in terms addressed not to benefit plans as such, but to the insurers who provide benefits under such plans.[11] Since

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[10] *Metropolitan Life* involved a state law mandating that certain benefits be paid under any group health plan. *See* 471 U.S. at 729-30. *Pilot Life* did not specify particular benefit payments, but set standards for judging the behavior of employee benefits plan administrators in determining whether or not the terms of the plan require payment of benefits. 481 U.S. at 48. The distinction between these two kinds of mandatory requirements governing the payment of benefits by employee benefit plans is immaterial to ERISA preemption.

[11] This was also the sense in which the Court in *Alessi v. Raybestos-Manhattan, Inc.*, *supra*, 451 U.S. at 525 used the term "indirect" in describing the reach of ERISA § 514(a). In that case, the state statute in question was part of its workers' compensation law, but *necessarily* affected pension plans as well by prohibiting those plans from setting off workers' compensation benefits against pension benefits. *Id.* at 521. The effect on pension plans was "indirect" only in the sense that the statute *in terms* was a protection of the right to workers' compensation benefits, not a limitation upon the pension benefit plans. But the latter impact was in no way speculative or contingent; rather, a pension benefit plan that provided for workers' compensation setoffs would violate state law.

As *Alessi* explained, the reason for including state action indirect in this sense was "to preclude the States from avoiding through

insurers not in compliance with the state payment standard would not be available to employee benefit plans in the state at all, the impact upon insured plans was in no way speculative, contingent, or derivative.

As Metropolitan Life put the point, the impact upon "*all* insured benefit plans" was "substantial[]", since the statute in question "requires" that such plans process and pay benefits in a certain manner. 471 U.S. at 739 (emphasis added); *see also FMC Corp. v. Holliday*, —— U.S. ——, 111 S. Ct. 403, 408-09 (1990) (holding that a state statute that "*prohibits* plans from being structured in a manner requiring reimbursement in the event of recovery from a third party" (emphasis supplied) is preempted because the statute *dictates* the employee benefit plan's payment formulae.)[12]

(ii) *Fort Halifax Packing Co. v. Coyne*, *supra*, did not turn on the meaning of the "relate to" phrase in ERISA § 514(a), since the Court concluded that the state law at issue in that case did not concern any "employee benefit *plan*" at all. 482 U.S. at 7-8. *Fort Halifax* is nonetheless relevant here for two reasons.

The Maine severance benefit statute in *Fort Halifax* provided that an employer must, upon closing a plant, pay either a severance benefit specified by state law or pay the benefits due under a contract providing for severance benefits. *Id.* at 5. The Court concluded that such a state-specified payment does not constitute an "employee benefit plan" because there is no ongoing obligation to make repeated payments. 482 U.S. at 7-8. The Court also recognized, however, that an employer's own contractual commitment to pay severance benefits could well constitute an employee benefit plan within the meaning of ERISA. 482 U.S. at 6 n.4, *citing Holland v. Burlington Industries, Inc.*, 772 F.2d 1140 (4th Cir. 1985), *summarily aff'd*, 477 U.S. 901 (1986); *Gilbert v. Burlington Industries, Inc.*, 765 F.2d 320 (2nd Cir. 1985), *summarily aff'd*, 477 U.S. 901 (1986). Thus, like *Shaw*, *Fort Halifax* necessarily held that as long as a state law creates one compliance option not covered by ERISA, there is no preemptive "relation to" an ERISA-covered employee benefit plan simply because the state provides an alternative of complying with its requirement through such a plan as well.[13]

Second, and more generally, *Fort Halifax* explains the purposes of ERISA preemption at some length, in a

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form the substance of the pre-emption provision." 451 U.S. at 525. *See also* p. 25, n.16, *infra* (discussing *Alessi's* reliance on § 514(c)(2), the definition of "State" within the preemption section, as the source of its conclusion that indirect as well as direct state action is precluded.)

[12] *FMC Corp.*, one of this Court's recent ERISA preemption cases, is instructive as well in demonstrating that while the Court continues to repeat the *Shaw* pronouncement that a state statute "relate[s] to" an employee benefit plan if the law has a "'connection with or reference to such a plan'" (*see* 111 S. Ct. at 407), the Court has never rested a preemption conclusion upon a state law's mere mention of an ERISA-covered employee benefit p[illegible]. In *FMC Corp.*, for example, the Court, after noting that the statute in question, as a verbal matter, did have a "reference" to employee benefit plans (111 S. Ct. at 408), went on to conclude that the state law had a "connection" to benefit plans of a kind that had a substantial and unavoidable impact upon the internal operations of those plans (*id.* at 408-09). If a mere "reference" to benefit plans were sufficient, the bulk of the "relate to" analysis in *FMC Corp.* would have been entirely superfluous.

[13] It is worth noting that providing an optional ERISA-covered compliance alternative necessarily intersects with and impacts upon the ERISA-covered employee benefit plan in several ways: First, the state statute, regulation, or decision providing the option almost certainly will "refer to" the ERISA-covered plan. Second, it is almost inevitable that there will be some practical incentive to choose the ERISA-covered compliance alternative, simply because the cost of maintaining one scheme for paying benefits is likely to be less than the cost of maintaining two separate schemes. Indeed, a statute such as the one involved in *Fort Halifax* provides an additional inducement, since an employer can apparently opt out of the statutorily-required benefits by paying contractual severance benefits in *any* amount.

manner that supports the conclusion that only substantial and unavoidable impacts upon the actual operation of employee benefit plans were ordinarily meant to be preempted:

> Statements by ERISA's sponsors in the House and Senate clearly disclose the problem that the preemption provision was intended to address. . . .
>
> These statements reflect recognition of the administrative realities of employee benefit plans. . . . The most efficient way to meet these responsibilities is to establish a uniform administrative scheme, which provides a set of standard procedures to guide processing of claims and disbursements of benefits. Such a system is difficult to achieve, however, if a benefit plan is subject to different *regulatory requirements* in differing States. A plan would be required to keep certain records in some States but not in others; to make certain benefits available in some states but not in others; to process claims in a certain way in some States but not in others; and to comply with certain fiduciary standards in some States but not in others. . .
>
> ERISA's pre-emption provision was prompted by recognition that employer's establishing and maintaining employee benefit plans are faced with the task of coordinating complex administrative activities. A patchwork scheme of regulation would introduce considerable inefficiencies in benefit program operation. . . *Pre-emption ensures that the administrative practices of a benefit plan will be governed by only a single set of regulations.* [471 U.S. at 9-11 (emphasis supplied).],

See also id. at 10-11 (reviewing the earlier cases in which ERISA preemption was found, and concluding that "We have not hesitated to enforce ERISA's preemption provision where state law created the prospect that an employer's *administrative scheme* would be subject to conflicting *requirements.*") (emphasis supplied).

Thus, *Fort Halifax*'s analysis of the scope of ERISA preemption indicates that § 514(a), for all its breadth, would *not* apply where there is some tie between a state law or regulation and an employee benefit plan, but that tie does not necessarily subject plan designers and administrators to differing requirements in structuring and operating the plan.

(iii) *Mackey v. Lanier Collections Agency & Service, Inc.*, 486 U.S. 825 (1988) is most easily deciphered by analyzing its second holding separately, and by then considering its initial holding in connection with *Ingersoll-Rand Co. v. McClendon*, —— U.S. ——, 111 S. Ct. 478 (1990).

Mackey held that a general state garnishment statute—permitting garnishers to make employee benefit plans parties to a suit and to secure a court order requiring the plan to pay benefits to someone *other* than the designated beneficiary—does *not* sufficiently "relate to" an employee benefit plan so garnished to invalidate the state law. 486 U.S. at 835-36. In coming to that conclusion, the *Mackey* Court did not deny, as it could not, that a state garnishment proceeding against an employee benefit plan had a "connection with" that plan, and *some* likely impact upon its internal administration. 486 U.S. at 831-32. Rather, *Mackey* said that the connection in question did not suffice.

In reaching that conclusion, *Mackey* surveyed the legislative materials as a whole to determine whether the particular connection between employee benefit plans and state garnishment procedures is one Congress intended to include an ERISA § 514(a) relationship. The Court's conclusion was that "Congress did not intend to forbid the use of state-law mechanisms of executing judgments against ERISA welfare benefit plans, even when those mechanisms prevent plan participants from receiving their benefits." 486 U.S. at 831-32 (emphasis supplied).

In other words, *Mackey* viewed the garnishment proceedings against an employee benefit plan as an adjunct to an underlying and otherwise valid, non-ERISA legal proceeding against the individual plan beneficiary. Insulating those judgments from enforcement against assets with substantial economic value would have compromised the state's ability to enforce rules of conduct entirely unrelated to ERISA, because of a real but quite minor impact upon the operation of ERISA employee benefit plans. This, said the Court, Congress had not intended to do.

(iv) The other aspect of *Mackey*, and the first of the two alternative holdings in *Ingersoll-Rand*, treated with state rules of decision in adjudication that had *no* non-ERISA-related purpose.[14] Indeed, in both *Mackey* and *Ingersoll-Rand*, the state law in question applied not to employee compensation generally, or even to employee benefit plans generally, but only to *ERISA*-covered benefit plans. *See Mackey*, 486 U.S. at 829; *Ingersoll-Rand*, 111 S. Ct. at 483 ("in order to prevail, a plaintiff must plead, and the court must find, that an ERISA plan exists and the employer had a pension-defeating motive in terminating the employment.") As such, the exclusion from garnishment proceedings for ERISA-covered benefits plans *only* (*Mackey*, 486 U.S. at 828-29), and the cause of action for ERISA pension-defeating termination *only* (*Ingersoll-Rand*, 111 S. Ct. 481) were "specifically *designed* to affect employee benefit plans' ". *Ingersoll-Rand*, 111 S. Ct. at 483, *quoting Mackey*, 486 U.S. at 829) (emphasis supplied).

These unusual state laws, in other words, did not simply mention, refer to, or have a derivative effect upon

[14] In *Ingersoll-Rand*, the Court rested its holding not solely upon § 514(a) preemption but, independently, upon the conclusion that "the Texas cause of action would be preempted because it conflicts directly with an ERISA cause of action." 111 S. Ct. at 484. Thus, the "relates to" analysis in *Ingersoll-Rand* was not necessary to the result reached in that case.

ERISA-covered employee benefit plans in the course of accomplishing some separate objective within the state's legitimate area of concern. Instead, both state laws were *directed precisely at affecting ERISA-covered plans, and such plans alone. See Mackey*, 486 U.S. at 838 n.12 (emphasis supplied) (it is "singl[ing] out ERISA plans, by express reference, *for special treatment*", and not the bare reference to benefit plans in the statute, that "preempts the Georgia antigarnishment exception.")[15]

[15] It was thus critical to the result in *Mackey* that the general garnishment statute was held *non*preempted. If, instead, the Court had concluded that the general garnishment statute *is* preempted as applied to ERISA-covered employee benefit plans, then the statutory "special treatment" for those plans would have been compelled by the federal scheme, and statutory references to that exclusion could not have been the basis, standing alone, for concluding that the exclusion evidenced a state purpose to affect employee benefit plans.

Similarly, state tax statutes must often "refer to" employee benefit plans in the purely verbal sense in order to explain whether contributions to or benefits paid by those plans are treated as taxable income or not, and, if the plan contributions or benefits are taxable, to provide for the tax calculation. *See, e.g., Retirement Fund Trust v. Franchise Tax Board*, 909 F.2d 1266, 1270 n.13 (9th Cir. 1990). The alternative of ignoring in state tax laws, regulations, and decisions the state tax treatment of ERISA employee-benefit-plan related contributions or benefit payments is entirely impractical.

Those contributions and benefits have real world economic value, are often provided as tradeoffs for taxable cash income, and resemble taxable income in that they are basically a form of compensation for employment. Obviously, these explanatory verbal references to employee benefit plans cannot, alone, sustain the conclusion that the statute "relates to" an employee benefit plan and is therefore preempted by ERISA.

Moreover, there is no self-evident answer to the question whether it is taxing or not taxing the various economic values employee benefit plans generate for participants that "relates to" the employee benefit plan; rather, in *either* case the state law "relates to" the plan both in the verbal sense *and* in the sense that the tax treatment may well affect whether contributions to the plan

This aspect of *Mackey* and the holding in *Ingersoll-Rand*, consequently, do *not* rest simply upon the linguistic mention of ERISA-covered employee benefit plans in a state statute. Both decisions do state, however, a special doctrinal corollary to the principles that have generally governed the interpretation of the "relates to" language of § 514(a): Where the state statute singles out *ERISA-covered* employee benefit plans particularly for unique treatment and does so for the principal purpose of directly affecting those plans, the Court has proscribed such direct state entries into the governance of ERISA plans, without regard to the actual impact of the statute upon ERISA plans. In effect, the Court has determined that where the central role of a state statute is precisely to affect *only* the federal interests in ERISA-covered employee benefit plans, there is no reason to apply a more flexible preemption standard in order to accommodate legitimate, non-ERISA-related state interests.[16]

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will be made at all, if so in what amounts, and when, and in what amount and when benefit payments will be made.

Consequently, the few courts that have addressed ERISA preemption of state tax statutes have generally regarded a neutral tax law that broadly " 'applies to employees without regard to their status as ERISA participants "as one that does not 'relate to' ERISA plans" and is therefore not preempted, even if the result is to tax ERISA benefit plan contributions or benefit payments. *Retirement Fund Trust v. Franchise Tax Board*, 909 F.2d at 1282; *Firestone Tire & Rubber Co. v. Neusser*, 810 F.2d 550 (6th Cir. 1987).

Conversely, where employee benefit plans themselves are singled out for unique taxes not otherwise levied on similar economic entities and transactions, such taxes are held to come within ERISA § 514(a), as state laws that single out benefit plans for special treatment. *E-Systems v. Pogue*, 929 F.2d 1100 (5th Cir.), *cert. denied*, —— U.S. ——, 112 S. Ct. —— (1991); *General Motors v. California Board of Equalization*, 815 F.2d 1305 (9th Cir. 1987), *cert. denied*, 485 U.S. 491 (1988).

[16] We note that this understanding of the ERISA § 514(a) analysis of *Ingersoll-Rand* may explain one aspect of that decision that is otherwise difficult to square with established principles of statutory

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construction generally, and of the construction of § 514 particularly.

ERISA § 514(c)(2), 29 U.S.C. § 1144(c)(2), provides: "The term "State" includes a State, any political subdivision thereof, or any agency or instrumentality of either, *which purports to regulate*, directly or indirectly, the terms and conditions of employee benefit plans covered by this subchapter." (emphasis supplied). *Alessi v. Raybestos-Manhattan, Inc., supra*, relied upon this section of the statute as providing guidance in determining the preemptive scope of the "relates to" language of § 514(a), "mak[ing] clear that even indirect state action bearing on private pensions may encroach upon the area of exclusive federal jurisdiction." 451 U.S. at 525.

In *Ingersoll-Rand*, however, without acknowledging at all the reliance of *Alessi* upon § 514(c)(2), the Court indicated that the *only* statutory role of that provision is to include within ERISA's preemptive scope "state agencies and instrumentalities whose actions might not otherwise be considered state law." 111 S. Ct. at 484. That construction of § 514(c)(2), if applied generally, would conflict squarely with *Alessi*, and raise the question anew whether state action not addressed to ERISA benefit plans as such are within § 514(a). *See* pp. 26-27, *infra*. The *Ingersoll-Rand* construction of § 514(c)(2) would also result in reading out of the statute the last eighteen words of § 514(c)(2). Under that construction, it appears, the only operative effect of that statutory section would be accomplished simply by including "any political subdivision, thereof, or any agency or instrumentality of either;" the rest of the statutory provision—"which purports to regulate, directly or indirectly, the terms and conditions of employee benefit plans covered by this subsection"—would be superfluous. As such, the *Ingersoll-Rand* interpretation of § 514(c)(2), if applied generally, would violate " 'the established principle that a court should give effect, if possible, to every clause and word of a statute.' " *Feist Publications v. Rural Telephone Co.*, —— U.S. ——, 111 S. Ct. 1282, 1284 (1991), *quoting Moskal v. United States*, 498 U.S. ——, 111 S. Ct. 461, 466 (1990).

Moreover, the legislative history summarized above shows that members of Congress uniformly referred to state *regulation* in describing the preemptive reach of the final version of ERISA, within the statute's preemptive scope, not other forms of state action. *See* pp. 13-16, *supra*. And, in any event, the kind of

4. *Application of ERISA § 514(a) to the Connection Between the Equity Amendment Act and Respondent's Health Benefits Plan:*

The D.C. Circuit ruled that the Equity Amendment Act "relates to" ERISA-covered employee benefits plans within the meaning of ERISA § 514(a) because the state law defines the required health benefits payable to workers eligible for workers compensation as benefits equivalent to those provided under the employers' basic health benefit plan. 948 F.2d at 1323. This kind of connection between a state statute and an ERISA-covered benefit plan cannot suffice to support §514(a) preemption under the analysis of this Court's cases presented above:

First, as that analysis shows, this Court has never held that a purely verbal state law "reference to" an employee benefit plan, standing alone, is sufficient to "relate" the state law to the employee benefit plan in the § 514(a) sense.

Second, the Equity Amendment Act does not relate to ERISA-covered employee benefit plans under the genertlly applicable standard for determining the reach of § 514(a). The Act has no substantial, unavoidable impact on the ERISA-covered health benefit plans in question; nothing in the Act requires that employers alter their ERISA-covered plan in any way. And, *Shaw* establishes, as we have seen, that simply providing employers with the option of complying with a statutory requirement

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state action involved in *Ingersoll-Rand was* regulatory in the sense that it established a mandatory rule of behavior.

The reference to "regulat[ion]" in § 514(c)(2) should therefore be read, at a minimum, as a guide toward interpreting the "relates to" language in § 514(a) as ordinarly limited to such mandatory rules of behavior, rather than other forms of state action. Under that approach, only where the state statute unambiguously, directly, and predominantly "relates to" ERISA-covered employee benefit plans alone would that interpretative guide be unnecessary and non-regulatory state actions preempted as well.

through a qualifying ERISA plan, where a non-ERISA covered weeks of compliance is also available, is *not* a sufficient relationship to trigger § 514(a)'s preemptive force.

Third, the Equity Amendment Act is not within the narrow range of circumstances, exemplified by the garnishment exclusion aspect of *Mackey* and by *Ingersoll-Rand*, in which the state statute in question is specifically designed to affect ERISA plans, and singles out such plans for special treatment. Rather, the state law is designed to provide a flexible measure of an appropriate level of health benefits, sensitive to particular employment situations, payable by a workers compensation plan *exempt* from ERISA's coverage under § 4(b)(3). And the state law, far from singling out ERISA-covered health benefit plans for special treatment, expressly provides a means of compliance which leaves existing ERISA benefit plans entirely intact, and treats ERISA and non-ERISA health benefit programs identically for purposes of the statutory equivalency standard.

Fourth, and finally, the opinion below devotes considerable attention to demonstrating that the Equity Amendment Act "*could* have a substantial effect on the administration of an ERISA-covered plan" because "the additional financial burden associated with an increase in ERISA health benefits "—*viz*, the increase in non-ERISA health benefits—"*could* induce an employer" to "choose to forego such an increase altogether." 948 F.2d at 1325 (emphases supplied). Speculations of this kind on possible derivative employer reactions to the economic impact of state laws that do not otherwise "relate to" employee benefit plans within the meaning of § 514(a), cannot possibly supply the statutory relationship that does not otherwise exist.

All manner of state laws entirely separate from any ERISA-covered employee benefit plan may affect, for economic reasons, an employer's decision (or the decision

of an employer and a union through collective bargaining) whether to maintain particular ERISA-covered benefit plans, and what terms and conditions to include in such plans. State and local minimum wage laws, taxes on individual and corporate income, unemployment compensation and other payroll taxes, sales taxes, and environmental regulations all affect both the total cost of doing business in a particular area and the amount and nature of employee compensation, and may thereby influence, to the same or greater degree than does the Equity Amendment Act, the design of ERISA-covered employee benefit plans.[17]

The prevalence of this kind of economic interaction only demonstrates that complete insulation of ERISA-covered employee benefit plans from the *all* nonfederal legal influence, or even all substantial nonfederal influence, is an impossibility under our complex form of government. Congress clearly did not intend to enact such an absurdity in making a last-minute change broadening the preemptive scope of ERISA in the Conference Report. By far the better reading of ERISA § 514(a), as the legislative materials and case law surveyed above establish, is that what Congress addressed in §514(a) is the much narrower (but still numerous) class of state laws whose *purpose* is to affect ERISA-covered employee benefit plans, or that clearly, substantially, and inevitably have an impact on ERISA-covered plans.

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[17] For example, the opinion below conceded that there would be no preemption if the state statute simply specified minimum levels of health benefits payable to workers compensation recipients. If those minimum levels were higher than the health benefits paid under an employer's standard health benefit plan, the actual impact on the ERISA-covered health benefit plan is likely to be greater then the effect of the state law at issue here: The employer would be under pressure to conform its standard health plan to the one prescribed by the state for workers compensation recipients, yet would have less money available to distribute for health benefits generally because of the inflexibility of the law governing the ERISA-exempt plan.

* * * *

In totality, then, the Equity Amendment Act bears no different relationship to ERISA-covered employee benefit plans than a state rule that includes the economic value of benefit plans in calculating the damages due to an individual who has for some reason suffered an actionable decrease in earnings.[18] In both instances, there must be a verbal "reference to" the terms of the ERISA-covered plan in order to apply the state rule. In both instances, however, the state rule in question is designed not to affect the ERISA-covered plan, but to affect a form of compensation or payment entirely outside ERISA coverage.[19] And in both instances, the ERISA-covered plan is either not affected at all, or is affected only derivatively, speculatively, and insubstantially, through some conceivable influence on employers when they design their ERISA-covered plans worked by the prospect that injured employees will be entitled to equivalent benefits.

The lower courts considering the impact of ERISA's preemption provisions on such state law damages calculation principles have concluded, correctly in our view, that Congress could not have intended to reach tenuous connections of this kind through ERISA's preemption provisions. *E.g., Martori Bros. v. James-Massengale*, 781 F.2d 1349, *amended*, 791 F.2d 799 (9th Cir.), *cert. denied*, 479

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[18] These situations include, for example, violation of any employment contract; termination in violation of public policy, or without just cause, under a state statute or common law rule providing causes of action for such terminations; an automobile injury or other physical injury leading to incapacity to work; or illegal failure to bargain over a collective bargaining agreement, where state law covers the particular collective bargaining relationship and mandates a make-whole remedy replicating the economic value of the agreement that would have been reached.

[19] In a damages action, for example, individuals are typically paid in noncontingent cash, a form of compensation certainty not within ERISA's statutory coverage. *See generally Massachusetts v. Morash*, 490 U.S. 107 (1989).

U.S. 149 (1986); *Pizlo v. Bethlehem Steel Corp.*, 884 F.2d 116, 120 (4th Cir. 1989); *Ethridge v. Harbor House Restaurant*, 861 F.2d 1389 (9th Cir. 1988).[20] For the same reasons, there is no ERISA § 514(a) preemption of the District of Columbia's Equity Amendment Act.

CONCLUSION

For the above stated reasons, the decision of the court below should be reversed.

Respectfully submitted,

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[20] It bears noting, indeed, that workers compensation plans are a *substitute* for tort recovery, and ordinarily extinguish tort causes of action for occupational injuries. Were such tort causes of action still available against employers, damages for loss of compensation would presumably include retroactive damages measured by the economic value of health benefits lost during the period of incapacity. No reason appears why, in devising the workers compensation substitute, states cannot require that the same purpose be met by prospectively providing a non-ERISA covered benefit plan, similarly measured by the otherwise available health benefits.

(9)

No. 91-1326

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

THE DISTRICT OF COLUMBIA
and SHARON PRATT KELLY, MAYOR,
Petitioners,

v.

THE GREATER WASHINGTON BOARD OF TRADE,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia

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BRIEF *AMICUS CURIAE* OF THE AMERICAN ASSOCIATION OF RETIRED PERSONS IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

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INTEREST OF AMICUS CURIAE [1]

The American Association of Retired Persons (AARP) is a nonprofit membership organization of more than thirty-three million persons age fifty and older. More than eleven million AARP members are employed, many of whom are covered by employer health insurance plans. Approximately sixteen million AARP members are under age 65, and generally not eligible for Medicare.

Since AARP was founded in 1958, access to health care has been a major Association priority. AARP is com-

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[1] The written consents of the parties have been filed with the Clerk of the Court pursuant to Supreme Court Rule 37.3.

mitted to ensuring that persons of all ages have access to adequate health care coverage.

Health insurance is essential to the well-being and financial security of workers and their families. Older persons typically take longer than younger persons to recover from certain injuries and illnesses. A number of illnesses that require extensive treatment occur more frequently in the older population than in the younger population. In addition, older persons are often foreclosed from obtaining adequate and affordable health insurance, particularly when they have preexisting conditions.

Older persons face significant risks from employment policies that fail to provide continued coverage to injured employees, their spouses and dependents. The loss of employer-provided health insurance when an employee receives workers' compensation can have disastrous consequences not only for that employee, but also for the employee's family. AARP is concerned that ERISA not be construed to defeat the continuation of health insurance for injured employees, particularly when Congress exempted workers' compensation laws from ERISA coverage.

Health insurance coverage is an extremely valuable and integral component of an employee's total compensation,[2] particularly for an older worker. While the purpose of workers' compensation is to provide an adequate replacement of the employee's prior earnings, the ruling

[2] In a 1991 Gallup survey of 1,000 individuals covered by an employer health plan, 65% of the respondents said health insurance is the most important employee benefit. Pensions were named as the second most important employee benefit by 35% of respondents. *See* Employee Benefits Research Institute, *Public Attitudes on the Value of Benefits* (1991). Respondents who were covered by an employer health plan (70% of all respondents) said the average amount of additional pay they would need in order to give up the benefit was $4,096. *Id.*

below effectively prevents the states from recognizing the value of health insurance coverage as part of overall compensation. In so doing, it impedes the objective of workers' compensation laws and jeopardizes the health and financial security of all workers and their families.

SUMMARY OF ARGUMENT

Since the start of this century, workers' compensation laws have been the domain of the state legislatures. In enacting ERISA[3] and other federal legislation, Congress has sought not to impinge upon the states' authority to enact adequate remedies for work-related injuries and diseases. The only exceptions have come when Congress has enacted comprehensive federal legislation for certain classes of workers, such as railroad employees, seamen, longshoremen, government employees, and members of the armed forces.

ERISA Section 514(a), 29 U.S.C. § 1144(a), should not preempt the District of Columbia's Workers' Compensation law merely because it, in part, measures a worker's loss of earning power by the health insurance coverage that he or she was entitled to at the time of the injury. Neither ERISA's plain language nor its legislative history support preemption based on the measure of a remedy. Far from being preempted by ERISA, the District's provision carries out the main purpose of workers' compensation programs that Congress sought to exempt from ERISA, namely replacing the lost earning power of injured workers. It is difficult, indeed, to imagine how states can measure the lost earnings represented by an injured worker's health benefits without referring to the cost of the insurance coverage the worker had before the injury.

Moreover, if ERISA Section 514 was held to preempt state law claims that provide for the recovery of lost

[3] Employee Retirement Income Security Act, 29 U.S.C. § 1001 *et seq.* (1988).

benefits, then the entire spectrum of claims and remedies that refer to existing benefits would be subject to ERISA preemption, such as state law remedies for wrongful discharge, discrimination, and even for personal injuries, as well as state law rules for the plans covered under each of the other exemptions described in ERISA Section 4(b), 29 U.S.C. § 1003(b). Surely, Congress never intended ERISA to preclude such a vast array of state law claims or remedies.

INTRODUCTION

Starting with New York's 1910 compensation statute, every state enacted workers' compensation statutes as "compromise systems" to resolve and redress the loss of earning power resulting from workplace injuries and diseases. L. Friedman, *A History of American Law* (2d ed. 1985), at 484 and 682-84. Under these statutes, "[e]mployers relinquish[] their defenses to tort actions in exchange for limited and predictable liability. Employees accept the limited recovery because they receive prompt relief without the expense, uncertainty and delay that tort actions entail." *Morrison-Knudsen Constr. Co. v. Director, Office Workers' Comp. Programs*, 461 U.S. 624, 636 (1983) (describing balance struck between concerns of employers and workers under 1927 Longshoremen's and Harbor Workers Act).

Workers' compensation statutes typically set benefits for injured employees by reference to a percentage of the compensation that the employee was receiving prior to suffering the injury. 2 A. Larson, *Law of Workmen's Compensation*, § 60.00. That percentage varies between 50 and 66⅔ percent. *Id.* In the District of Columbia, the workers' compensation law provides 66⅔ percent of the employee's average weekly wage at the time of the injury for total disability. D.C. Code Ann. §§ 36-308, 36-311.[4] Medical expenses of the injured employee that

[4] If a worker permanently loses the use of part of his or her body, a fixed schedule of payments applies. In the District of Columbia, for example, 200 weeks of compensation is awarded for the permanent loss of hearing in both ears. D.C. Code Ann. § 36-308.

result from the injury are also required to be paid. D.C. Code Ann. § 36-307(a).

In the District, as in the states, the statutory compensation constitutes the *exclusive* remedy available to employees to redress work-related injuries and death. Injured workers are not allowed to draw workers' compensation and then institute separate lawsuits against the employer to secure additional benefits or damages to round out the compensation that the state has afforded them. D.C. Code Ann. § 36-304; *see, e.g., Myco, Inc. v. Super Concrete Co.*, 565 A.2d 293, 296 (D.C. 1989).

I. HEALTH INSURANCE COVERAGE IS AN INTEGRAL PART OF AN INJURED EMPLOYEE'S COMPENSATION.

Employers pay an ever-increasing portion of total compensation to employees in the form of benefits that are in addition to the base hourly, biweekly or monthly rate of pay.[5] Both employees[6] and employers[7] cite health insurance as the most important employee benefit within the compensation package. The primary benefits are health insurance, pension and/or savings plans, paid vacation and sick leave, group term life insurance, and severance pay. Between 1950 and 1990, the percentage of compensation provided through benefits (including the employee portion of Social Security) increased from under 10 percent to over 27 percent of payroll. *See* Wiatrowski, *Family-Related Benefits in the Workplace*, 113 Monthly

[5] Employee benefits typically represent between twenty to thirty per cent of an employee's compensation. *Employee Benefits for American Workers*, Research Rep. No. 89-09, The National Commission for Employment Policy, 1 (June 1990).

[6] *See, e.g.*, note 2, *supra*.

[7] General Accounting Office, *Workforce Issues: Employment Practices in Selected Large Private Companies* (1991).

Lab. Rev. 28, 32 (1990), and Chen, *The Growth of Fringe Benefits*, 104 Monthly Lab. Rev. 3, 5 (1981) (cited in *Morrison-Knudsen Constr. Co.*, 461 U.S. at 636).

Because workers' compensation statutes are exclusive, it is essential that states have the power to enact statutes that provide *adequate* compensatory remedies for a worker's injury and lost earning capacity. To the extent workers' compensation statutes ignore the benefit component of compensation and remain rooted in pre-World War II compensation methods, they provide inadequate replacement compensation for employees whose remuneration is heavily weighted in favor of such benefits. The 1972 *Report of the National Commission on State Workmen's Compensation Laws* thus found:

> "Because workmen's compensation benefits usually are tied solely to earnings, the program is increasingly deficient in the protection provided to the remuneration [including benefits] of American workers."

Id., at 54; *see also* 36-37.

While it is far from the predominant method, six states include the value of certain benefits in the wage bases that are used in calculating workers' compensation awards. *See* 2 A. Larson, *Law of Workmen's Compensation*, § 60.12 (1991 Cum. Suppl.) (citing Alabama, Alaska, Colorado, Florida, Kansas, and Maine).[8] In five additional states and three of the same ones, the level of compensation is set at a higher level, but the employer is allowed to *offset* the value of certain benefits against the worker's compensation award. *Id.*, at vol. 4, § 97.51(b)

[8] Cf. *Morrison-Knudsen Constr. Co. v. Director, Office Workers' Comp. Programs*, 461 U.S. 624, 632 (1983) (Congress did not intend to include fringe benefits in "wages" when it enacted statute that later became the District of Columbia Workmen's Compensation Act; if statute is to be altered to include fringe benefits within definition, it is the legislature's task).

and App. B-18A-1 (citing Alaska, Colorado, District of Columbia, Maine, Michigan and Ohio); *see also* U.S. Chamber of Commerce, *1992 Analysis of Workers' Compensation Laws*, at 18-21 (citing same states plus Louisiana and Massachusetts). For example, the District of Columbia has an offset from the worker's compensation award if benefits received from "employee benefit plans subject to [ERISA]" and from Social Security exceed 80 percent of the compensation award. D.C. Code Ann. § 36-308(9).[9]

With the enactment of the 1990 Equity Amendments Act, the District of Columbia followed the State of Connecticut in taking benefits into account in providing remedies for workplace injuries in an innovative way. The District, like Connecticut, offered injured employees a remedy that includes the cost of health insurance coverage for a period up to 52 weeks. Under the 1990 EAA, employers are required to pay the cost of health insurance coverage equivalent to that which the injured employee possessed before the injury. D.C. Code Ann. § 36-307 (a-1).

The EAA was a substantial, but not radical, departure from existing law. Like all of the states, the District requires the employer to pay the medical expenses of the injured employee that result from the injury. D.C. Code Ann. § 36-307(a). This coverage accounts for 39 percent of all workers' compensation expenditures. U.S. Chamber of Commerce, *1992 Analysis of Workers' Compensation Laws*, viii; *see also* 2 A. Larson, *Law of Workmen's Compensation*, § 61.00 (one-third of expenditures for medical coverage in 1961 study). Effectively, the Equity Amendments Act added the cost of continuing the coverage the

[9] The decision this term in *General Motors Corp. v. Romein*, 60 U.S.L.W. 4203 (March 9, 1992), concerned whether the Michigan statute allowing workers' compensation awards to be coordinated with employer-funded pension and disability benefits was retroactive.

employee had prior to his injury, *i.e.*, the cost for medical expenses not related to the injury and coverage of the spouse and dependents for a period of up to 52 weeks.

II. THE DISTRICT'S WORKERS' COMPENSATION PROGRAM IS EXEMPT FROM ERISA PREEMPTION UNDER *SHAW v. DELTA AIR LINES.*

When Congress enacted ERISA in 1974, it did not manifest any intention to impinge upon the states' ability to enact adequate remedies for work-related injuries. Under ERISA Section 514, Congress provided that ERISA preempts state laws that "relate to any employee benefit plan described in section 4(a) and not exempt under section 4(b)." 29 U.S.C. § 1144(a). Benefit plans that are "exempt under section 4(b)" include plans that are "maintained solely for the purpose of complying with applicable workmen's compensation laws or unemployment compensation or disability insurance laws." 29 U.S.C. § 1003(b). Hence, Congress intended that state laws that "relate to an[] employee benefit plan" that is "maintained solely for the purpose of complying with applicable workmen's compensation laws" would *not* be preempted.

In *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 108 (1983), this Court held that Section 514(a) does not preempt laws requiring insurance plans to include certain benefits as long as the employer has the option of providing the benefit under an ERISA plan. Because the EAA provides such an option to employers, it is not preempted by ERISA.

Employers satisfy the District's Workers' Compensation law by purchasing insurance from a workers' compensation insurance carrier. D.C. Code Ann. § 36-334. Employers can also self-fund their workers' compensation program if they meet certain requirements that prove their financial ability to pay. *Id.* The 1990 EAA directs employers to provide the required "health insurance coverage" as a part of the employer's workers' compensation

program. As with the other workers' compensation benefits, the employer must provide this coverage through an insurance carrier unless it meets the requirements for self-funding. *Id.*

The 1990 EAA does *not* require an employer to include the injured employees under its ERISA health plan or to alter the ERISA plan in any manner; it merely requires that the employer pay the cost of equivalent insurance coverage for injured employees.[10] If the employer chooses, it can provide the equivalent health insurance coverage by continuing to include the employee under its ERISA health plan. However, the statute does not require, or encourage, employers to use that mechanism.[11]

In the *Greater Washington Board of Trade* decision (hereafter "*GWBT*"), the U.S. Court of Appeals for the District of Columbia acknowledged that *Shaw* permits state workers' compensation laws to require minimum health benefits as a part of an injured worker's compensation without running into ERISA preemption. 948 F.2d 1317, 1323 (D.C. Cir. 1991). The D.C. Circuit's opinion thus concludes:

> Had the Equity Amendment Act . . . simply required all employers to provide specified minimum health benefits for employees receiving workers' compensation—it would clearly have survived preemption under the principles announced in *Shaw*.

948 F.2d at 1323. The Respondent Board of Trade agrees, as stated in its opposition to *certiorari*, that "[i]f . . . the state mandated health benefits for injured workers which

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[10] The employer is reimbursed for the entire cost of this coverage at the end of the year from a D.C. Special Fund. D.C. Code Ann. § 36-307(a-1)(5). The Special Fund, in turn, assesses both workers' compensation insurers and employers who self-fund their programs. D.C. Code Ann. § 36-340. The cost of the insurance is thus ultimately borne by employers.

[11] Indeed, the rules on self-funding preclude the employer from using a self-funded ERISA plan to provide this coverage unless the employer meets the financial ability requirements.

were not tied to the employer's health insurance . . . , then the Second Circuit's decision [in *Donnelley*] would have been correct." Opp. to Cert. Petition, at 6; *see also id.* at 9, 11.[12]

III. ERISA SECTION 514 DOES NOT PREVENT THE CALCUATION OF REMEDIES FOR LOST COMPENSATION BY REFERENCE TO EXISTING BENEFITS.

As discussed immediately above, no one questions the District's authority to mandate that employers provide health insurance coverage as one of the remedies for work-related injury or disease. Thus, the D.C. and Second Circuits, and the parties, actually diverge on only *one* issue: Can the District of Columbia (or a state) determine which injured workers are to receive this remedy and measure its cost by looking to the health insurance coverage the worker possessed before his or her injury?

The D.C. Circuit identified the critical difference between its opinion and the Second Circuit's decision in *R.R. Donnelley & Sons, Co. v. Prevost*, in that *Donnelley*:

> [F]ocused on only half the story. [T]he court failed to appreciate the fact that the Connecticut statute (like the Equity Amendment Act in this case) related to an ERISA-covered plan by *tying the new benefits to existing benefits* and by *limiting the law's applicability to employers already providing benefits through ERISA plans.*

948 F.2d at 1324 (emphasis added). The D.C. Circuit concluded that the EAA's "tying the new benefits to existing benefits" caused it to impermissibly "relate to" employee benefit plans covered under ERISA. *Id; see also* 948 F.2d at 1322 (EAA relates to ERISA plans "by requiring that the new benefits be 'equivalent' to those already provided under an existing covered plan and by defining the employers who are obliged to provide the new benefit as those who already provide benefits under a covered plan"). As the Board of Trade describes it, the "critical fact," for the purpose of ERISA preemption was that the workers' compensation law *"triggers and indeed measures* the required health benefit level by the employer's health insurance." Opp. to Cert. Petition, at 6 (emphasis added).

With respect, the D.C. Circuit's decision would take the ERISA Section 514(a) "relates to" language in an unintended direction that unduly impairs the Section 4(b) exemption for workers' compensation plans. Indeed, the point that the *GWBT* decision objects to—the EAA's "tying the new benefits to existing benefits"—is the main function that workers' compensation laws are enacted to carry out. How else is a state to replace an injured employee's lost remuneration than by referring to the benefits he or she had at the time of the injury?

Martori Bros. Dist., Inc. v. James-Massengale, 781 F.2d 1349, 1358-59 (9th Cir. 1986), *modified*, 791 F.2d 799, *cert. denied*, 479 U.S. 949, 1018 (1986), may best illustrate why the D.C. Circuit's interpretation of the "relates to" language in ERISA Section 514 is inconsistent with ERISA's preemptive purposes. In *Martori*, the California agricultural labor board provided a remedy for an employer's unfair labor practices that included the cost of certain benefits as part of the remedy. Like the Board of Trade, the employer challenged the remedial order by arguing that ERISA preempted any remedy that is tied to the benefits provided under ERISA plans. The Ninth Circuit rejected this argument, finding that the state's "make-whole orders do not require any change whatsoever in existing ERISA plans" and holding that

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[12] Universal coverage—requiring all employers to provide specified minimum health benefits—is clearly preferable from the standpoint of the injured employees. But one can readily imagine the outcry from business associations, such as the Board of Trade, if the District's Council had proposed that workers' compensation include the cost of health insurance coverage *even if* the employer did not offer such coverage to its uninjured workers.

"ERISA [Section 514] does not prevent the calculation of damages for lost compensation by reference to existing ERISA plans." The Ninth Circuit observed that the expansive reading that the employer proposed would lead to "absurd" results, such as finding ERISA preemption in personal injury suits when the damages include loss of benefits under ERISA plans.

Every other court that has examined the question has reached the same conclusion as *Martori*: ERISA does not preempt a state law law because it measures a remedy for an unlawful act by an employee's existing benefits. For example, in *Teper v. Park West Galleries, Inc.*, 431 Mich. 225, 427 N.W.2d 535, 541 (Mich. 1988), an employer maintained that ERISA preempted a state law action for wrongful discharge because the damages that the employee sought were in part measured by the value of benefits that had been lost. The Supreme Court of Michigan held that an award can include damages that represent the cost of future benefits without being preempted by ERISA. *See also Schultz v. Nat'l Coalition of Hispanic Mental Health Organizations*, 678 F. Supp. 936, 938 (D.D.C. 1988) (damages for discharge in violation of District's Human Rights Act may include lost benefits without becoming an ERISA case); *Jaskilka v. Carpenter Technology Corp.*, 757 F. Supp. 175, 178 (D. Conn. 1991) (damages for breach of employment contract can include value of lost benefits).

Here, the case against preemption is even stronger because Congress expressly exempted the workers' compensation remedies that the states require employers to provide. If the state law remedies furnished to the employees in *Martori* and *Teper* do not "relate to" employee benefit plans—even though no exemption appears in ERISA to preserve those state law remedies—then, *a fortiori*, the state law worker's compensation remedy here —which is protected by ERISA Section 4(b)—should not be preempted.

The *GWBT* decision should be reversed because it cannot logically be confined to its narrow facts. As just one example of its expansiveness, if the District's reference to existing "health insurance coverage" results in preemption, then the District's express offset for benefits received from "employee benefit plans subject to the Employee Retirement Income Security Act of 1974"—a provision that the Board of Trade has not challenged—would also be preempted. *See* D.C. Code Ann. § 36-308(9). Similarly, even the definitions of "wages" in the state workers' compensation law that include certain benefits would be preempted.

If the *GWBT* decision were to be affirmed, all of the other ERISA Section 4 exemptions that Congress crafted —for government and church plans, plans maintained outside of the U.S. primarily for nonresident aliens, and excess benefit plans—would also be impaired. For example, an "excess benefit" plan that is exempt under ERISA Section 4(b)(5) may offer a corporate executive 70 percent of final average salary less the pension benefit already furnished under the covered ERISA plan. If the *GWBT* decision were upheld, that offset would be preempted because it "relates to" the existing ERISA plan. Indeed, if *GWBT* was applied, the excess benefit plan exemption would be virtually wiped out of the statute. This is because ERISA Section 3(36), 29 U.S.C. § 1002(36), *defines* an excess benefit plan as a plan that provides benefits for "certain employees" that are in "excess of" the benefits offered to the employee under tax-qualified ERISA plans. *See also* J. Mamorsky, *Employee Benefits Law*, at 5-15 (3d ed. 1991).[13]

[13] Likewise, if a government plan exempt under Section 4(b)(1) says that certain health benefits are contingent on whether the worker or the spouse receives benefits under other employer-provided coverage, including from ERISA plans, the *GWBT* decision would preempt that language from the ostensibly "exempted" government health plan.

On examination of these consequences, it is clear that the Second Circuit's decision in *R.R. Donnelley & Sons, Co. v. Prevost*, 915 F.2d 787 (2d Cir. 1990), *cert. denied*, 111 S. Ct. 1415 (1991), did not "fail[] to appreciate" this "half [of] the story." Instead, like the Ninth Circuit in *Martori* (but with a different rationale), the Second Circuit drew the line under Section 514(a) in a manner that protects ERISA plans from state regulation, but does not wreak havoc on workers' compensation programs that Congress sought to exempt from ERISA's preemption.

In *Stone & Webster Eng'g Corp. v. Ilsley*, 690 F.2d 323, 329 (2d Cir. 1982), *aff'd mem.*, 463 U.S. 1220 (1983), the Second Circuit had found that an earlier version of Connecticut's workers' compensation statute was preempted when it required employers to alter their ERISA health plans to include injured employees. But in *Donnelley*, the Second Circuit held that Connecticut's new statute fell within the Section 4(b) exemption when it merely directed employers to provide injured workers with coverage under the workers' compensation program and did not require the employer to alter the ERISA plan. 915 F.2d at 793. The Second Circuit thus preserved the important policies that the Section 4(b) exemption for workers' compensation plans was designed to protect while remaining consistent with Section 514(a)'s aims in regard to protecting ERISA plans from state regulation.[14]

Finally, the D.C. Circuit decision erred in stating that the EAA "limited the law's applicability to employers already providing benefits through *ERISA plans*." 948 F.2d at 1324 (emphasis added); *see also id.* at 1323 (the

[14] *Accord Richardson v. Lahood & Assoc., Inc.*, 571 So.2d 1082, 1086 (Ala. 1990) (ERISA does not preempt state workers' compensation statute prohibiting attachment or garnishment of such benefits for the repayment of any debt, including to an employee benefit plan, even though *Alessi* would preempt the statute if it prohibited ERISA plans from reducing their benefits by the amount of a worker's compensation award).

EAA "would clearly have survived preemption" had it "made no reference to existing ERISA-covered plans"). In fact, the EAA contains no reference to "ERISA plans," nor is its applicability "limited" to ERISA plans. The Act refers to "health insurance coverage" existing at the time of the injury. That coverage is not limited to ERISA plans; instead, it includes insurance coverage that is offered by an employer on an individual basis and health coverage offered by an entity that is exempt from ERISA (such as a governmental agency or church). Compare D.C. Code Ann. § 36-301(10) and 36-303 with ERISA Sections 3(1) and 4(b), 29 U.S.C. §§ 1002(1) and 1003(b).[15]

IV. THE *GWBT* DECISION IMPOSES A RESTRICTION ON STATE WORKERS' COMPENSATION LAWS THAT NEITHER ERISA SECTION 514 NOR ITS LEGISLATIVE HISTORY SUPPORT.

From the standpoint of statutory construction, the U.S. Court of Appeals for the District of Columbia's opinion cannot stand because it reads a restriction into ERISA Section 514(a) and Section 4(b)(3) that the plain words and underlying intent of the statute do not support. As the district court below astutely observed, the analysis that the Board of Trade offered, and that the D.C. Circuit later accepted, "infer[s]" a requirement under the ERISA Section 4(b)(3) exemption that the [workers' compensation] plan [may] not in any way refer to another ERISA plan." District Ct. slip op., Appendix to Pet. for Cert. at 27a.

The problem with that inference is that neither ERISA's plain language nor its legislative history support it. To the contrary, the legislative history indicates that Congress "acknowledged and accepted" that no "Chinese wall"

[15] The health coverage referred to in the Act is also narrower than that subject to ERISA. The EAA refers to the employee's "health *insurance* coverage" at the time of the injury, whereas ERISA encompasses both insured and uninsured health plans.

existed "between ordinary ERISA plans and plans maintained solely to comply with workers' compensation laws." Dist. Ct. slip op., Appendix to Pet. for Cert. at 28a (citing *Alessi v. Raybestos-Manhattan, Inc.*). At the time that Congress enacted ERISA, workers' compensation offsets, such as that found in D.C. Code § 36-308(9), were already in existence. *See Myers v. State*, 428 P.2d 83 (Colo. 1967) (ruling on Colorado R.S. Sec. 8-51-101 (1)(d)); *Green v. Stringer*, 389 N.E.2d 510 (Ohio 1978) (ruling on Ohio R.C. 4123.56 [enacted in 1967].[16]

The extensive reach of ERISA preemption suggested by the *GWBT* decision essentially undermines the main objective of workers' compensation programs. Under *GWBT*, workers' compensation statutes in the 50 states and the District would anomalously be prohibited from measuring injured employees' loss of earning power by the total remuneration that the employees were earning at the time of the injury. Any reference to the benefits that the employee was earning would be declared off limits. This is equivalent to saying that workers' compensation statutes can now redress only *part* of the workers' lost earnings.

There is no indication whatsoever that Congress intended ERISA to impose such a restriction on workers' compensation laws. Nor did Congress intend preemption to freeze in time the choices that state legislatures had theretofore made in enacting workers' compensation laws. As Judge Wald pointed out, ERISA's exemptions were not created to serve as barriers to the states' enactment of "innovative" workers' compensation plans. 948 F.2d at 1318 n.1.

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[16] In *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 524 (1981), this Court overturned a state workmen's compensation law that directed ERISA plans to alter *their* benefit formulas.

CONCLUSION

In summary, Congress expressly recognized the states' traditional interest in enacting adequate workers' compensation laws in ERISA Sections 514(a) and 4(b). ERISA Section 514(a) should not be turned around to restrict the authority of the states and the District in measuring the remedies for work-related injuries by an employee's total compensation, including the value of the employee's existing health coverage.

Respectfully submitted,

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No. 91-1326

In The
Supreme Court of the United States
October Term, 1991

THE DISTRICT OF COLUMBIA AND SHARON PRATT KELLY, MAYOR,
Petitioners,

v.

THE GREATER WASHINGTON BOARD OF TRADE,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

Brief of Amicus Curiae, State of Oklahoma Ex Rel Dave Renfro, Commissioner of Labor, Administrator of the Workers' Compensation Court and the Attorney General

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

OTHER AUTHORITIES

No. 91-1326

In The
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INTEREST OF AMICUS CURIAE

The State of Oklahoma, through its primary enforcement agencies in the workers' compensation arena, is concerned that the opinion rendered by the District of Columbia Circuit provides encouragement for promoters to hide behind perceived ERISA preemption to avoid traditional responsibilities in the workers' compensation area. Oklahoma's concerns are not unlike those of most states with similar compulsory laws and insurance requirements. (See 1991 Analysis of Workers' Compensation Laws, prepared and published by the U.S. Chamber of Commerce, APPENDIX)

The Oklahoma Commissioner of Labor is responsible for enforcing workers' compensation insurance requirements. The Commissioner of Labor is concerned about leasing companies and other employers which devise an unregulated "ERISA screen" to avoid the requirement to carry approved workers' compensation insurance. The Commissioner fears an overbroad opinion such as the one

rendered by the District of Columbia Circuit appears to sanction employers removing themselves from the workers' compensation system and its requirements. The Commissioner of Labor has recently been required to cite employers for failing to carry insurance. The Commissioner faces threats to remove workers' compensation cases from the Oklahoma court system to federal court because of an "ERISA" plan and dicta contained in Circuit opinions now under review by this Court.

The Administrator of the Workers' Compensation Court is responsible for approving self-insurance, either group or individual, for employers who may elect this as an alternative to an insurer approved by the Insurance Commission. The Administrator faces the prospect of these employers no longer maintaining authorized insurance if they are allowed to remove themselves from the workers' compensation system by hiding behind "ERISA."

The State, through the Attorney General and various District Attorneys, enforces its requirements with both civil and criminal penalties.

SUMMARY OF ARGUMENT

While ERISA preemption is expansive, state laws such as disability insurance and workers' compensation, are not preempted. This Court should overrule the District of Columbia Circuit opinion under review because it is at odds with Shaw v. Delta Air Lines, Inc., 463 U.S. 85 (1983). The Second Circuit correctly applied Shaw in R.R. Donnelley & Sons Company v. Prevost, 915 F.2d 787 (2d Cir. 1990), cert. denied, 111 S.Ct. 1415 (1991).

Blurring of lines protecting state disability and workers' compensation laws from preemption by ERISA unnecessarily encourages opportunistic promoters to profit from stonewalling state enforcement efforts. The misapplication of Shaw by the Circuit Court has contributed to increasing numbers of Oklahoma employers, particularly company leasing formats, who are refusing to comply

with mandatory insurance requirements for paying workers' compensation claims. Oklahoma is entitled to enforce its workers' compensation laws in the court established for that purpose.

ARGUMENT

THE DECISION BELOW IS IN CONFLICT WITH SHAW AND THREATENS THE ENFORCEMENT OF OKLAHOMA'S WORKERS' COMPENSATION LAWS.

The State of Oklahoma may maintain a workers' compensation system without fear it will be destroyed by ERISA. In Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 108 (1983), this Court unanimously concluded, "Congress surely did not intend, at the same time it preserved the role of state disability laws, to make enforcement of those laws impossible." First, this Court made clear that "the State may not require an employer to alter its ERISA plan." However, "[i]f the State is not satisfied that the ERISA plan comports with the requirements of its disability insurance law, it may compel the employer to maintain a separate plan that does comply." Id.

The Second Circuit's opinion in R.R. Donnelley & Sons Co. v. Prevost, 915 F.2d 787, 793 (2d Cir. 1990) clearly applies the Shaw principle of freely allowing the states to enforce those areas of insurance law retained to them.

The District of Columbia Circuit's opinion in Greater Washington Board of Trade v. District of Columbia, 948 F.2d 1317, 1326 (D.C. Cir. 1991), blurs the meaning of "relate to."

Broad language to preempt the District of Columbia law was the Circuit Court's reaction to its suspicions that "appellees have now tried to regulate indirectly what they were forbidden to regulate directly." 948 F.2d at 1326. Broad language by the Circuit has given rise in Oklahoma to promoters pushing plans as a way to avoid the state's ordinary enforcement of its workers' compensation laws. This Court's affirmance of the District of Columbia Circuit opinion would further encourage promoters and force the State of Oklahoma to

devote considerable time and resources to protracted litigation to preserve its workers' compensation system.

Nothing suggests that Congress sought to erode the states' dominance of their workers' compensation systems. When ERISA was passed in 1974, the Conference Committee favored preemption but explained that,

> (However, following title I generally, preemption will not apply to government plans, church plans . . . work[ers'] compensation plans, non-U.S. plans primarily for nonresident aliens, and so called 'excess benefit plans.')

H.R. CONF. REP. NO. 1280, 93rd Cong., 2d Sess. 383 (1974)

There is a strong congressional policy that workers' compensation cases "have little real business in a federal court." Kay v. Home Indemnity Company, 337 F.2d 898, 901 (5th Cir. 1964). The federal statutes prohibit the removal of all workers' compensation cases. Title 28, U.S.C. §1445(c); Olivarez v. Utica Mutual Insurance Company, 710 F.Supp. 642, 643 (N.D. Tex. 1989). Another Texas district court concluded that, "Clearly this provision [29 U.S.C. §1003(b)(3)] is intended to exempt state worker's compensation plans generally from preemption by ERISA." Foust v. City Insurance Company, 704 F.Supp. 752, 753 (W.D. Tex. 1989).

Oklahoma established a mandatory requirement for insurance, whether through an authorized insurer or approved self-insurance, either group or individual. Title 85, Okla. Stat. §61. The Oklahoma Legislature established requirements for policies of insurance. Title 85, Okla. Stat. § 64. The Legislature also established an Individual Self-Insured Guaranty Fund, Title 85, Okla. Stat. §66.1, and a Group Self-Insurance Guaranty Fund, Title 85, Okla. Stat. §66.2.

An employer who fails to secure workers' compensation insurance, either through an authorized insurer or approved self-insurance, is liable for a civil penalty enforced by the Commissioner of Labor. Title 85, Okla. Stat. §63.1-63.2. An employer who willfully fails to provide compensation may be charged with criminal penalties. Title 85, Okla. Stat. §63.3.

This Court in Shaw did not prevent Oklahoma, or any other state, from accepting an ERISA plan if it complies with Oklahoma's statutory insurance requirements. But Shaw left Oklahoma free to reject an ERISA plan if it did not comport with Oklahoma's requirements for insurance compensation for workers.

II. THIS COURT SHOULD AVOID BROAD LANGUAGE WHICH ENCOURAGES PROMOTERS TO EVADE STATE INSURANCE REQUIREMENTS BY HIDING BEHIND ERISA.

This Court should reverse the District of Columbia Circuit and avoid contributing to the use of ERISA as a means to subject the States to further abuses by promoters and sharp operators who would rely on overly broad language interpreting ERISA. The states, including Oklahoma, are beset with promoters who seek to take advantage of regulatory confusion. The Senate Permanent Subcommittee on Investigations has an on-going investigation documenting these issues which plague the states.

On May 15, 1990, the Senate Permanent Subcommittee on Investigations held the first in a series of public hearings to examine the ability of the nation's current regulatory system to combat fraud and abuse in the insurance industry. Subsequent hearings were held on April 24, June 26 and July 19, 1991. The hearings examined a number of potential vulnerabilities in the insurance regulatory system which were ripe for abuse and marketed on a national scale with little or no regulation. Although the Subcommittee is continuing its investigation of insurance fraud and abuse, it issued an interim report setting forth its findings and recommendations.

The Subcommittee noted that despite amendments to clarify

ERISA preemption provisions, states continue to complain that fraudulent promoters still attempt to wrap themselves in the mantle of an employee benefit plan, enabling them to escape state regulatory efforts. Permanent Subcommittee on Investigations, Committee on Governmental Affairs United States Senate, "Interim Report on Combatting Fraud and Abuse in Employer Sponsored Health Benefit Plans," Report 102-262 (1992), p. 7. The Subcommittee concluded that ERISA has become a "tactical nuclear weapon" used by fraudulent promoters "against the threat of state regulation." Id. at 9. For example, alleged union sponsored plans and employee leasing operations provide opportunities for promoters to exploit workers and the system. Id. at 14-15, 19. James Long, North Carolina Commissioner of Insurance, described operational structures which were a "subterfuge to try to hide in the language of ERISA and avoid state regulation." Hearing before the Permanent Subcommittee on Investigations of the Committee on Governmental Affairs United States Senate, May 15, 1990, S. Hrg. 101-799, p. 98. The Subcommittee said in its conclusion,

> For almost 18 years now, comen, crooks, and hucksters have been able to take advantage of a continuing regulatory vacuum (be it actual or perceived) in the area of self-insured employer sponsored health benefit programs to fleece unsuspecting employers and their employees of hard-earned dollars. They have built their lavish lifestyles on the shattered lives of innocent men, women and children while regulators have argued with one another over who has jurisdiction and whether the problem already has been solved. Interim Report at 17-18.

Jo Ann Howard, Texas Board of Insurance member, warned that "new schemes are multiplying right now like cancerous cells." Hearing at 9. Tom Gallagher, Florida Insurance Commissioner, testified that his state is "home to virtually every benefit alternative now being explored." Id. at 11. Senator Roth concluded, "When there is that much money involved, it should come as no surprise that slick operators have developed schemes which prey upon the unsuspecting

and leave victims scarred for life." Id. at 15. Ms. Howard lamented, "The States lose, the participants lose, the legitimate insurance companies lose. The only people who come out ahead in this are the swindlers and the crooks. . . ." Id. at 26.

As a result of the Circuit's retreat from Shaw, the State of Oklahoma has experienced an increasing number of citations issued as a result of promoters using an unregulated ERISA plan to avoid purchase of approved insurance as required by Oklahoma's workers' compensation laws.

CONCLUSION

This Court should overrule the District of Columbia Circuit and reinforce the principles of Shaw so that the states, including Oklahoma, will be free to enforce their workers' compensation system free of protracted litigation in federal court.

Respectfully submitted,

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Proof of Service

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APPENDIX

1991
Analysis of

WORKERS' COMPENSATION LAWS

Prepared and Published by
the U.S. Chamber of Commerce

CHART I **TYPE OF LAW AND INSURANCE REQUIREMENTS** **January 1, 1991**

JURISDICTION	TYPE OF LAW	INSURANCE	SELF INSURANCE	PENALTIES ON FAILURE TO INSURE
ALABAMA	Compulsory	Required	Individual and group	[illegible]
ALASKA	Compulsory	Required	Permitted	[illegible]
AMERICAN SAMOA	Compulsory	Required	Permitted	[illegible]
ARIZONA	Compulsory	Required	Individual and group	[illegible]
ARKANSAS	Compulsory	Required	Individual and group	[illegible]
CALIFORNIA	Compulsory	Required	Permitted	[illegible]
COLORADO	Compulsory	Required	Individual and group	[illegible]
CONNECTICUT	Compulsory	Required	Permitted	[illegible]
DELAWARE	Compulsory	Required	Individual and group	[illegible]
DISTRICT OF COLUMBIA	Compulsory	Required	Permitted	[illegible]
FLORIDA	Compulsory	Required	Individual and group	[illegible]
GEORGIA	Compulsory	Required	Individual and group	[illegible]
GUAM	Compulsory	Required	Not permitted	[illegible]
HAWAII	Compulsory	Required	Individual and group	[illegible]
IDAHO	Compulsory	Required	Permitted	[illegible]
ILLINOIS	Compulsory	Required	Individual and group	[illegible]
INDIANA	Compulsory	Required	Permitted	[illegible]
IOWA	Compulsory	Required	Individual and group	[illegible]
KANSAS	Compulsory	Required	Individual and group	[illegible]
KENTUCKY	Compulsory	Required	Individual and group	[illegible]
LOUISIANA	Compulsory	Required	Individual and group	[illegible]
MAINE	Compulsory	Required	Individual and group	[illegible]
MARYLAND	Compulsory	Required	Individual and group	[illegible]
MASSACHUSETTS	Compulsory	Required	Individual and group	[illegible]
MICHIGAN	Compulsory	Required	Individual and group	[illegible]
MINNESOTA	Compulsory	Required	Individual and group	[illegible]
MISSISSIPPI	Compulsory	Required	Individual and group	[illegible]
MISSOURI	Compulsory	Required	Individual and group	[illegible]
MONTANA	Compulsory	Required	Individual and group	[illegible]
NEBRASKA	Compulsory	Required	Permitted	[illegible]
NEVADA	Compulsory	Required in state fund	Individual	[illegible]
NEW HAMPSHIRE	Compulsory	Required	Individual and group	[illegible]
NEW JERSEY	Elective	Required	Permitted	[illegible]
NEW MEXICO	Compulsory	Required	Individual and group	[illegible]
NEW YORK	Compulsory	Required	Individual and group	[illegible]

[illegible]

CHART I ☐ TYPE OF LAW AND INSURANCE REQUIREMENTS ☐ January 1, 1991 (continued)

JURISDICTION	TYPE OF LAW	INSURANCE	SELF-INSURANCE	PENALTIES FOR FAILURE TO INSURE
NORTH CAROLINA	Compulsory	Required	Individual and group*	[illegible]
NORTH DAKOTA	Compulsory	Required in state fund	Not permitted	[illegible]
OHIO	Compulsory	Required in state fund	Permitted	[illegible]
OKLAHOMA	Compulsory	Required	Individual and group	[illegible]
OREGON	Compulsory	Required	Individual and group	[illegible]
PENNSYLVANIA	Compulsory	Required	Permitted	[illegible]
PUERTO RICO	Compulsory	Required in territorial fund	Not permitted	[illegible]
RHODE ISLAND	Compulsory	Required	Individual and group	[illegible]
SOUTH CAROLINA	Elective	Required*	Individual and group	[illegible]
SOUTH DAKOTA	Compulsory	Required	Individual and group	[illegible]
TENNESSEE	Compulsory	Required	Individual and group	[illegible]
TEXAS	Elective	Required*	Not permitted**	[illegible]
UTAH	Compulsory	Required	Permitted	[illegible]
VERMONT	Compulsory	Required	Permitted	[illegible]
VIRGIN ISLANDS	Compulsory	Required in territorial fund	Not permitted	[illegible]
VIRGINIA	Compulsory	Required	Individual and group	[illegible]
WASHINGTON	Compulsory	Required in state fund	Permitted*	[illegible]
WEST VIRGINIA	Compulsory	Required in state fund	Permitted	[illegible]
WISCONSIN	Compulsory	Required	Permitted	[illegible]
WYOMING	Compulsory	Required in state fund*	Not permitted	[illegible]
F.E.C.A.	Compulsory	Federal government		
LONGSHORE ACT	Compulsory	Required	Individual and group	[illegible]
ALBERTA	Compulsory	Required in provincial fund	Not permitted	[illegible]
BRITISH COLUMBIA	Compulsory	Required in provincial fund*	Not permitted	[illegible]
MANITOBA	Compulsory	Required in provincial fund	Not permitted	[illegible]
NEW BRUNSWICK	Compulsory	Required in provincial fund*	Not permitted	[illegible]
NEWFOUNDLAND	Compulsory	Required in provincial fund	Not permitted	[illegible]
NORTHWEST TERRITORIES	Compulsory	Required in territorial fund	Not permitted	[illegible]
NOVA SCOTIA	Compulsory	Required in provincial fund	Not permitted	[illegible]
ONTARIO	Compulsory	Required in provincial fund	Not permitted	[illegible]
PRINCE EDWARD ISLAND	Compulsory	Required in provincial fund	Not permitted	[illegible]
QUEBEC	Compulsory	Required in provincial fund	Not permitted	[illegible]
SASKATCHEWAN	Compulsory	Required in provincial fund	Not permitted	[illegible]
YUKON TERRITORY	Compulsory	Required in territorial fund	Not permitted	[illegible]
CANADIAN MERCHANT SEAMEN'S ACT	Compulsory	Required	At discretion of Board	[illegible]

[illegible]

(11)

No. 91-1326

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ON WRIT OF CERTIORARI
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[redacted] BRIEF OF THE CONNECTICUT BUSINESS AND INDUSTRY ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

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The Connecticut Business and Industry Association ("CBIA") respectfully moves for leave to file the accompanying brief as amicus curiae in this case. Letters of consent from the Petitioners, the District of Columbia and Sharon Pratt Kelly, and the Respondent, the Greater Washington Board of Trade, have been filed with this motion.

INTEREST OF AMICUS

The Connecticut Business and Industry Association is the largest business and trade association in the State of Connecticut, having approximately 7,000 members who employ a total work force of over 700,000 employees. CBIA presents the views of its members on public policy and legal issues to legislative and judicial authorities.

CBIA's principal interest lies in having this Court affirm the ruling of the court below that the District of Columbia statute is preempted by ERISA.[1] The District of Columbia statute was modeled on a Connecticut statute that imposes significant financial and administrative burdens on nearly all of CBIA's members. Furthermore, many of CBIA's members sponsor multi-state benefit plans which, despite ERISA's express goal of national uniformity, are now subject to disparate local regulations.

---

[1] The Employee Retirement Income Security Act of 1974, as amended ("ERISA"), codified at 29 U.S.C. §§ 1001-1461 (1988).

For all the foregoing reasons, the Connecticut Business and Industry Association respectfully moves for leave to file the accompanying brief as amicus curiae.

Respectfully submitted,

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page**

Statutes **Page**

Other Authorities

INTEREST OF THE AMICUS CURIAE

The interest of the Connecticut Business and Industry Association in this case is set forth in the accompanying Motion for Leave To File Brief as Amicus Curiae.

REASONS FOR AFFIRMING THE DECISION OF THE D.C. CIRCUIT

Summary of Argument

The decision below should be affirmed to promote the important policy objectives underlying ERISA[1] preemption. The goal of ERISA's preemption provision "was to minimize the administrative and financial burden of complying with conflicting directives among States . . . ." *Ingersoll-Rand Co. v. McClendon*, __ U.S. __, 111 S. Ct. 478, 484 (1990) (citations omitted). The D.C. statute[2] at issue in this case, and the Connecticut statute[3] upon which it was modeled, explicitly refer to and specifically target ERISA-covered plans and their sponsors. These statutes require employers who provide benefits to their active employees through ERISA-covered plans to provide the same level of benefits to employees eligible to receive workers' compensation. The D.C. statute and its Connecticut counterpart undermine the Congressional

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[1] The Employee Retirement Income Security Act of 1974, as amended ("ERISA"), codified at 29 U.S.C. §§ 1001-1461 (1988).

[2] Workers' Compensation Equity Amendment Act of 1990 (D.C. Act 8-261) ("Equity Amendment Act" or "D.C. statute") (the relevant portion of which is codified at D.C. Code § 36-307 (a-1) (1991 Supp.) (App. A1)).

[3] Conn. Gen. Stat. § 31-284b (1991) ("Connecticut statute") (App. A3).

intent of "ensur[ing] that plans and plan sponsors would be subject to a uniform body of benefit law . . . ." *Id.* (citations omitted).

The D.C. and Connecticut statutes exemplify how states, through statutory sleight of hand, seek to regulate ERISA-protected plans in ways that Congress sought to foreclose through ERISA's broad preemption provisions. Indeed, this Court's failure to affirm the decision below would create a new and gaping hole in ERISA preemption. As illustrated by the decision of the Second Circuit with respect to the Connecticut statute,[4] a state statute previously held by this Court to be preempted by ERISA could be resurrected and made "preemption-proof" by recodifying it in the state's workers' compensation, disability or unemployment compensation laws and providing a nominal option for compliance through a "separately administered" plan.

For employers subject to the burdensome and often inconsistent requirements of state laws like the D.C and Connecticut statutes, the administrative and financial costs are real. CBIA estimates that Connecticut employers who provide health insurance benefits to their active employees must pay an additional $20,315,000 each year to provide "equivalent" benefits to employees eligible for workers' compensation. Employers who change their ERISA plans face the administrative burdens of tracking subclasses of employees whose benefit levels were set based on the plan in effect when they first became eligible to receive workers' compensation. The easiest way for employers to avoid these added costs is to eliminate employee benefits altogether, which cures the problem but kills the patient Yet for employers in the District of Columbia and Connecticut, eliminating or reducing benefits to active

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[4] *R.R. Donnelley & Sons Co. v. Prevost*, 915 F.2d 787 (2d Cir. 1990), *cert. denied*, ___ U.S. ___, 111 S. Ct. 1415 (1991).

employees may well be the only viable alternative — unless this Court affirms the decision below.

Argument

1. The D.C. Statute Does Not Affect ERISA-Protected Plans In So Tenuous, Remote, Or Peripheral A Manner As To Avoid ERISA Preemption.

ERISA explicitly "supersede[s] any and all State laws insofar as they may now or hereafter relate to any employee benefit plan. . . ." ERISA § 514(a), 29 U.S.C. § 1144(a). "A law 'relates to' an employee benefit plan, in the normal sense of the phrase, if it has connection with or reference to such a plan." *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85, 96-97 (1983). The "express preemption provisions of ERISA are deliberately expansive. . ." *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 45-46 (1987), and "Congress used the words 'relate to' in § 514(a) [the preemption provision] in their broad sense." *FMC Corp. v. Holliday*, ___ U.S. ___, 111 S. Ct. 403, 408 (1990) (citation omitted). Thus, ERISA preempts state laws that "relate to" employee benefit plans "even if the law is not specifically designed to affect such plans, or if the effect is only indirect." *Ingersoll-Rand*, 111 S. Ct. at 483 (citing *Pilot Life*, 481 U.S. at 47).

Notwithstanding the extraordinary breadth of ERISA preemption, this Court has recognized a narrow exception for laws of general applicability that "affect employee benefit plans in too tenuous, remote, or peripheral a manner to warrant a finding that the law 'relates to' the plan." *Shaw*, 463 U.S. at 100 n.21. *See also Mackey v. Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825 (1988) (Georgia's general garnishment statute not preempted by ERISA). The *Amici* inappropriately seize upon this exception to justify the D.C. statute, which specifically applies to ERISA plans. *Amici* also attempt to analogize the ongoing and intrusive burdens of the D.C. statute to an employer's one-time obligation to pay a

general tort award measured, in part, by an employee's lost benefits.[5] These arguments are strained and unpersuasive.

The D.C. statute requires only those employers who provide benefits through ERISA-covered plans to their active employees to provide "equivalent" benefits to employees who are eligible to receive workers' compensation.[6] Thus, the D.C. statute specifically refers to and explicitly targets ERISA-covered plans and their sponsors. Like the Texas cause of action held preempted in *Ingersoll-Rand*, "[w]e are not dealing here with a generally applicable statute that makes no reference to, or indeed functions irrespective of, the existence of an ERISA plan." *Ingersoll-Rand*, 111 S. Ct. at 483. "[T]here simply is *no* [obligation] if there is no plan." *Id.* at 484. Moreover, as held by the court below, the "*Shaw* 'exception' — that ERISA does not preempt state laws which affect benefit plans in a tenuous or peripheral manner— applies only to laws of general application; it does not protect state laws which specifically refer to ERISA benefit plans." *Greater Washington Bd. of Trade v. District of Columbia*, 948 F.2d 1317, 1322 n.13 (D.C. Cir. 1991), *cert. granted*, ___ U.S. ___, 112 S. Ct. 1584 (1992) (quoting *In re Dyke*, 943 F.2d 1435, 1448 (5th Cir. 1991)). The D.C. statute, which directly targets ERISA-covered plans, is not a law of general application and cannot avoid ERISA preemption under the exception articulated in *Shaw*.

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[5] *See* Brief of the American Federation of Labor and Congress of Industrial Organizations as Amicus Curiae in Support of Petitioners at 29; Brief of Amicus Curiae of the American Association of Retired Persons in Support of Petitioners at 11-12.

[6] There are, however, two categories of plans providing benefits to employees generally that fall within the D.C. statute but are exempt from ERISA coverage — namely, governmental and church plans. ERISA § 4(b)(1), (2), 29 U.S.C. §§ 1003(b)(1), (2) (App. A5).

Indeed, this Court has "virtually taken it for granted that state laws which are 'specifically designed to affect employee benefit plans' are preempted under § 514(a)." *Ingersoll-Rand*, 111 S. Ct. at 483 (quoting *Mackey*, 486 U.S. at 829). Like the Pennsylvania anti-subrogation law found preempted in *FMC Corp.*, the D.C. statute makes reference to, and therefore is specifically designed to affect, benefit plans governed by ERISA.[7] Accordingly, in text and application, the D.C. statute "relates to" benefit plans protected from state regulation by ERISA.

Nor can the D.C. statute be saved by analogy to generalized tort damage awards. Unlike the D.C. statute, damage awards that refer to benefit levels in ERISA plans do not saddle such plans and their sponsors with substantial and continuous administrative obligations. These damage awards can be discharged by a single cash payment by the employer outside of an ERISA-covered plan. Thus, like the state-imposed severance obligations upheld in *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1 (1987), these awards can be satisfied without the establishment or maintenance of an on-going plan. In contrast, the obligations imposed by the D.C. statute directly target and affect the operation of ERISA plans. *See General Elec. Co. v. New York State Department of Labor*, 891 F.2d 25, 29 (2d Cir. 1989), *cert. denied*, 496 U.S. 912 (1990), *aff'd in part & rev'd in part*, 936 F.2d 1448 (1991) (New York prevailing wage law which imposed additional obligations on employers based on the degree to which their ERISA-covered plans failed to conform to local

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[7] The Pennsylvania anti-subrogation law held preempted in *FMC Corp.* applied to "[a]ny program, group contract or other arrangement for payment of benefits" and these terms "includ[e], but are not limited to, benefits payable by a hospital plan corporation or a professional health service corporation." *FMC Corp.*, 111 S. Ct. at 408 (citation omitted). The D.C. statute simply, but no less broadly, refers to "health insurance coverage." While neither statute makes an explicit reference to ERISA, both statutes obviously refer to benefits provided under plans covered by ERISA.

benefit standards is preempted, in part, because the benefit obligations imposed by the statute cannot be eliminated by a single cash payment). Moreover, the nominal option to create a separate plan to administer benefits under the D.C. statute does not sever the continuing link between the "separate" plan and the ERISA plan upon which it is premised. Thus, the link between ERISA-covered plans and the D.C. statute is far more substantial than the one-time obligation to pay a damage award.

As elaborated below, by imposing continuing economic and administrative burdens on ERISA-covered plans, the D.C. statute effectively regulates protected plans because the power to tax or burden ERISA plans truly is the power to regulate them. Accordingly, the D.C. statute clearly, specifically and directly "relates to" ERISA-covered plans and should be preempted by the express terms of ERISA § 514(a), 29 U.S.C. § 1144(a).

2. The Decision Below Promotes Congress' Goal Of National Uniformity Of Employee Benefit Plan Law And Prevents States From Regulating ERISA-Covered Plans Inconsistently.

Unless this Court affirms the decision below, state laws like the D.C. and Connecticut statutes will create particularly burdensome and inconsistent requirements for employers who sponsor ERISA-covered plans for employees in several states. Indeed, the Connecticut and D.C. statutes, while similar in concept, are different in several respects. Moreover, the disparate requirements imposed on multi-state plans and their sponsors may grow: other states may mandate benefits at levels that differ from the District of Columbia's and Connecticut's requirements (e.g., 80% of the coverage provided to active employees); they may set different mandatory time periods for providing these benefits (e.g., for up to one year of workers' compensation eligibility, as in the District of Columbia, or for the entire period of workers' compensation eligibility, as in Connecticut); or they may require employers to pay the same portion

of the cost of coverage as they did when the employee was active (as in Connecticut) or to pay the entire cost of the mandated coverage (as in the District of Columbia). Furthermore, states may target other ERISA plan benefits (e.g., pension benefits) as the basis for benefits mandated by statute. Thus, employers who sponsor multi-state benefit plans will not only be burdened by state-imposed obligations because of their ERISA-covered plans; they also may be burdened inconsistently by such obligations.

"Section 514(a) [of ERISA] was intended to ensure that plans and plan sponsors would be subject to a uniform body of benefit law; the goal was to minimize the administrative and financial burden of complying with conflicting directives among States or between States and the Federal Government." *Ingersoll-Rand*, 111 S. Ct. at 484 (citing *FMC Corp.*, 111 S. Ct. at 409; *Fort Halifax*, 482 U.S. at 10-11 (1987); *Shaw*, 463 U.S. at 105, and n.25). By imposing an additional statutory requirement based upon the existence and terms of ERISA-covered plans, the D.C. and Connecticut statutes "subject plans and plan sponsors to burdens not unlike those Congress sought to foreclose through [ERISA] § 514(a)." *Ingersoll-Rand*, 111 S. Ct. at 484.[8]

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[8] The enactment of COBRA (codified at §§ 601-608 of ERISA, 29 U.S.C. §§ 1161-1168 (1988), and § 4980B of the Internal Revenue Code of 1986, as amended, 26 U.S.C. § 4980B (1988)) further supports ERISA's broad preemption of this area. COBRA requires employers maintaining certain group health plans to offer covered employees and their dependents the opportunity to extend coverage, at the employee's cost, upon the occurrence of certain events. Unlike the D.C. and Connecticut statutes, COBRA is a comprehensive and procedurally complete statute. For example, COBRA coverage terminates when the employer discontinues health benefits to active employees and when the COBRA beneficiary becomes covered under any other group health plan or entitled to Medicare benefits. ERISA, § 602(2), 29 U.S.C. § 1162(2) (1988). The enactment of COBRA illustrates the role of ERISA's preemption provision in reserving to Congress the exclusive authority to regulate employee benefit plans.

The saga of the Connecticut and D.C. statutes tells a cautionary tale about states' desires to regulate ERISA-covered plans. Initially, Connecticut ordered employers to allow compensation-eligible employees to continue to participate in the employers' ERISA plans. When federal courts held that ERISA preempted Connecticut's forced inclusion of compensation-eligible employees,[9] the state enacted the current version of the statute, Section 31-284b, which simply moved the same substantive requirement to another section of the Connecticut statutes and gave employers various options for compliance.[10] The District of Columbia, following the district court ruling in *Donnelley*, enacted the Equity Amendment Act modeled on the Connecticut statute. *Greater Washington Bd. of Trade*, 948 F.2d at 1324, n.22. This Court may write the final chapter of this tale by affirming the decision below. Absent such a concluding chapter, the states will have a road map for circumventing ERISA preemption in the areas

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[9] *Stone & Webster Eng'g Corp. v. Ilsley*, 690 F.2d 323 (2d Cir. 1982), *aff'd mem. sub nom., Arcudi v. Stone & Webster Eng'g Corp.*, 463 U.S. 1220 (1983) held that Conn. Gen. Stat. § 31-51h (1981), the statutory predecessor to the Connecticut statute, was preempted by ERISA. The current Connecticut statute differs from its preempted predecessor in only one respect: the old law prohibited an employer from removing from its ERISA plan those employees who were eligible for workers' compensation, while the new statute gives the employer the option of keeping such employees in the plan or providing "equivalent" coverage through a separately administered plan.

[10] The Connecticut Attorney General aptly summarized the legislative history of the Connecticut statute as follows:

> Section 31-284b was enacted for the purpose of bringing the requirements of section 31-51h into the Workers Compensation Act *without substantive change*, in response to the District Court decision in *Stone & Webster*, [518 F. Supp. 1297 (D. Conn. 1981)].

1984 Conn. Op. Att'y Gen. 357, 361 No. 87-93 (emphasis added).

mentioned in ERISA § 4(b)(3): workers' compensation, disability benefits, and unemployment compensation. States would then be permitted to enact such laws that premised and measured employers' obligations to provide these kinds of benefits based upon the terms of each employer's ERISA-covered plan.

Indeed, this Court's failure to affirm the decision below would create a new and gaping hole in ERISA preemption through which states can resurrect previously preempted laws. For example, in *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504 (1981), this Court struck down a New Jersey workers' compensation statute. The New Jersey law provided that the injured employee's right to compensation payments "shall not be set off against [his or her] retirement pension benefits or payments." 451 U.S. at 508 (quoting N.J. Stat. Ann. § 34:15-29 (West Supp. 1980-1981) (as amended by 1977 N.J. Laws, Ch. 156)). Absent an affirmance of the decision below, however, New Jersey could achieve the same result: the state could mandate that, if a pension plan reduced the level of payments based on receipt of workers' compensation benefits, the employer must reimburse the employee for the lost pension income through a separately administered plan.[11]

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[11] This example and the Second Circuit's decision in *Donnelley* illustrate the apparent ease with which states can regulate ERISA plans by imposing obligations on plan sponsors. Connecticut has decided that employers ought to continue accident, health and life plan benefits on behalf of inactive employees who are eligible to receive workers' compensation, notwithstanding the employers' right under ERISA to limit plan participation to active employees. Because it cannot order an employer to change the terms of its ERISA plan, the State imposes a cost on employers whose plans it finds deficient. Under the Connecticut statute, the fee matches the "deficiency" in the ERISA-covered plan: the employer must provide "equivalent" coverage within or outside of the plan. Indeed, other states impose such costs using a slightly different method: including the value of employer-provided benefits in an employee's wages that form the basis for workers' compensation awards. *See, e.g.*, Kan. Stat. Ann. § 44-511(2), (3) ("wages" defined to include the value of employer-paid life, health and accident insurance and employer

(. . . *Continued*)

By affirming the decision below, this Court will prevent this blatant circumvention of ERISA preemption and promote Congress' goal of national uniformity in the regulation of ERISA-covered plans. In the absence of an affirmance by this Court, the obvious option for employers to avoid state laws like the D.C. and Connecticut statutes is simply to avoid establishing ERISA-covered plans altogether. *FMC Corp.*, 111 S. Ct. at 408; *Fort Halifax*, 482 U.S. at 11. Ultimately, this will harm the very employees that Congress intended to protect.

3. The Financial And Administrative Burdens Imposed By The D.C. And Connecticut Statutes Impel Employers To Eliminate Existing ERISA Plans Or Forego Establishing New Plans.

The D.C. statute and its Connecticut counterpart impose significant and direct financial burdens on employers who sponsor ERISA-covered employee benefit plans. CBIA estimates that in 1991 the cost to Connecticut employers of providing just the health insurance coverage mandated by the Connecticut statute was approximately $20,315,000.[12] While some employers might

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(. . . *Continued*)

contributions to pension and profit sharing plans); Alaska Stat. § 23.45.010 ("wages" defined to include employer contributions for medical care and other fringe benefits). In each case, the result is the same as under the D.C. and Connecticut statutes: only employers who sponsor ERISA-covered plans are subject to the statutorily imposed burdens.

[12] This cost estimate is computed as follows:

a. In 1991, the average per employee annual cost to Connecticut employers of providing health insurance was $4,232. Diane Levick, *Employer Health Costs Up*, Hartford Courant, January 28, 1992, at

(. . . *Continued*)

voluntarily bear part of this expense (particularly for short-term absences), Connecticut allows for no choice in the matter. Absent contrary guidance from this Court, the potential targets for state-generated burdens like the D.C. and Connecticut statutes will not be limited to health and life insurance plans and their sponsors. Indeed, states could require employers to make pension plan contributions on behalf of compensation-eligible employees that are "equivalent" to

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(. . . *Continued*)

B1 (reporting on the Health Care Benefits Survey prepared by A. Foster Higgins & Co.).

b. The Connecticut Department of Labor estimates that the average Connecticut employee works 1,620 hours per year which, assuming a 7.5 hour workday, translates into 216 workdays per year. Thus, the cost to Connecticut employers of providing health insurance to employees in 1991 was approximately $20 per work day ($4,232 / 216 days).

c. Connecticut workers who were eligible for workers' compensation benefits experienced 1,231,200 days of absence from work in 1990 (the latest year for which such figures are available). *See* Conn. Dept. of Labor, *Connecticut Occupational Injuries and Illnesses Report* (1990).

d. 82.5% of Connecticut workers are covered by employer-provided group health insurance. Lewin/ICF, *Blue Ribbon Comm'n on State Health Insurance Proposal to Expand Access to Health Care in Connecticut* (March 1, 1990). Thus, it can be inferred that 82.5% of the days of absence described in c. above were incurred with respect to such employees. Accordingly, approximately 1,015,740 days (1,231,200 days X 82.5%) of employer-provided coverage were mandated by the Connecticut statute in 1991.

e. Therefore, in 1991, the approximate cost to Connecticut employers of providing the health care benefits required by the Connecticut statute was $20,315,000. (1,015,740 days X $20).

those made while the employee was active. Similarly, states could require employers to provide pension, medical and other benefits as unemployment "compensation."

In addition to the direct costs of the additional benefits, the D.C. and Connecticut statutes impose several administrative burdens on sponsors of ERISA-protected plans. For example, both the D.C. and Connecticut statutes set the required benefits at the level provided when the employee first became eligible to receive workers' compensation. D.C. Code § 36-307(a-1)(3) (App. A1); *Gagnon v. Liberty Oil Equip.*, 7 Conn. Workers' Comp. Rev. Op. 81 (1989). Thus, each time an employer amends a benefit plan, it may create another subclass of employees with benefits that differ from those in the current plan. Over time in the volatile world of employee benefits, these subclasses may grow in number and range. Indeed, even after an employer terminates a plan or can no longer obtain coverage, it will remain liable to provide benefits defined by earlier plans to all of the subclasses of employees receiving workers' compensation. Furthermore, an employer must not only keep track of all of the subclasses of employees, it may have to self-insure the inactive employees because their benefit levels differ from the employer's current plan.

The administrative problems of tracking subclasses of employees are exacerbated in Connecticut, which sets no time limit on the employer's obligation to compensation-eligible employees. Unlike the D.C. statute, which caps the employer's obligation at fifty-two weeks, Connecticut ties the requirement to provide equivalent benefits solely to the employee's eligibility for workers' compensation. Conn. Gen. Stat. § 31-284b(a) (1991) (App. A3). Since an employee who suffers a "partial permanent disability" may be eligible for compensation indefinitely, an employer's obligation under the Connecticut statute can continue for many years. *See* Conn. Gen. Stat. §§ 31-308(a), 31-308a (1991).

With the cost of providing health insurance benefits to employees rising at an alarming rate, employers are compelled to

search for ways to reduce their health insurance expenditures. All too often the only viable alternative for employers is to reduce or even eliminate the health insurance benefits that they provide to employees. Since only employers who do not sponsor ERISA-covered plans are beyond the reach of the D.C. and Connecticut statutes, the statutes provide an additional incentive for employers to forgo creating or maintaining health plans. Moreover, since both statutes refer explicitly to the benefit levels in ERISA-covered plans, employers who might otherwise provide generous benefits to active employees are unwilling — or financially unable — to do so. Thus, these statutes burden not only ERISA plan sponsors but also their active employee participants and dependents.

Accordingly, this Court should affirm the decision below because of the substantial burdens imposed on ERISA plans by state-imposed regulations like the D.C. and Connecticut statutes.

CONCLUSION

For the reasons set forth above, CBIA respectfully requests that this Court affirm the decision of the D.C. Circuit.

Respectfully submitted,

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July 1992

APPENDIX

CONTENTS OF APPENDIX

D.C. Code § 36-307(a-1)

§ 36-307. Medical services, supplies, and insurance.

* * * * * *

(a-1)(1) Any employer who provides health insurance coverage for an employee shall provide heath insurance coverage equivalent to the existing health insurance coverage of the employee while the employee receives or is eligible to receive worker's compensation benefits under this chapter.

(2) For purposes of this subsection, the phrase "eligible to receive" means:

(A) An employee is away from work due to a job-related injury for which the employee has filed a claim for workers' compensation benefits under this chapter; or

(B) An employer has knowledge of a job-related injury of an employee who is away from work due to the job-related injury pursuant to which workers' compensation benefits may become due under § 36-315.

(3) The provision of health insurance coverage shall not exceed 52 weeks and shall be at the same benefit level that the employee had at the time the employee received or was eligible to receive workers' compensation benefits.

(4) Except as provided in paragraph (3) of this subsection, an employer shall pay the total cost for the provision of health insurance coverage during the time that the employee receives or is eligible to receive workers' compensation benefits under this chapter, including any contribution that the employee would have made if the employee had not received or been eligible to receive workers' compensation benefits.

(5) An employer shall be reimbursed for the provision of health insurance coverage required by this subsection from the special fund established in § 36-340. If an employer fails to provide health insurance coverage and an employee subsequently procures the insurance coverage and receives reimbursement for the procurement of insurance coverage from the employer pursuant to subsection (d) of this section, the employer shall be reimbursed from the special fund only for the amount that the employer would have paid for the coverage if the employer had provided the coverage.

Conn. Gen. Stat. Ann. § 31-284b
(West 1987 & Supp. 1992)

Sec. 31-284b. Employer to continue insurance coverage or welfare fund payments for employees eligible to receive workers' compensation. Use of second injury fund

(a) In order to maintain, as nearly as possible, the income of employees who suffer employment-related injuries, any employer who provides accident and health insurance or life insurance coverage for any employee or makes payments or contributions at the regular hourly or weekly rate for full-time employees to an employee welfare plan shall provide to such employee equivalent insurance coverage or welfare plan payments or contributions while the employee is eligible to receive or is receiving workers' compensation payments pursuant to this chapter, or while the employee is receiving wages under a provision for sick leave payments for time lost due to an employment-related injury. As used in this section, "income" means all forms of remuneration to an individual from his employment, including wages, accident and health insurance coverage, life insurance coverage and employee welfare plan contributions and "employee welfare plan" means any plan established or maintained for employees or their families or dependents, or for both, for medical, surgical or hospital care benefits.

(b) An employer may provide such equivalent accident and health or life insurance coverage or welfare plan payments or contributions by: (1) Insuring his full liability under this section in any stock or mutual companies or associations that are or may be authorized to take such risks in this state; (2) creating an injured employee's plan as an extension of any existing plan for working employees; (3) self-insurance; or (4) by any combination of the methods provided in subdivisions (1) to (3), inclusive, of this subsection that he may choose.

(c) In the case of an employee welfare plan, an employer may provide such equivalent protection by making payments or contributions for such hours of contributions established by the trustees of the employee welfare plan as necessary to maintain continuation of such insurance coverage when the amount is less than the amount of regular hourly or weekly contributions for full-time employees.

(d) In the case where compensation payments to an individual for total incapacity under the provision of section 31-307, as amended by section 23 of public act 91-32 and section 26 of this act, continue for more than one hundred four weeks, the cost of accident and health insurance or life insurance coverage after the one hundred fourth week shall be paid out of the second injury fund in accordance with the provisions of section 31-349, as amended by section 35 of public act 91-32 and section 36 of this act.

(e) Accident and health insurance coverage may include but shall not be limited to coverage provided by insurance or directly by the employer for the following health care services: Medical, surgical, dental, nursing and hospital care and treatment, drugs, diagnosis or treatment of mental conditions or alcoholism, and pregnancy and child care.

ERISA § 4, 29 U.S.C. § 1003 (1988)

§1003. COVERAGE.

(a) Except as provided in subsection (b) of this section and in sections 1051, 1081, and 1101 of this title, this subchapter shall apply to any employee benefit plan if it is established or maintained –

(1) by any employer engaged in commerce or in any industry or activity affecting commerce; or

(2) by any employee organization or organizations representing employees engaged in commerce or in any industry or activity affecting commerce; or

(3) by both

(b) The provisions of this subchapter shall not apply to any employee benefit plan if –

(1) such plan is a governmental plan (as defined in sections 1002(32) of this title);

(2) such plan is a church plan (as defined in section 1002(33) of this title) with respect to which no election has been made under sections 410(d) of Title 26;

(3) such plan is maintained solely for the purpose of complying with applicable workmen's compensation laws or unemployment compensation or disability insurance laws;

(4) such plan is maintained outside of the United States primarily for the benefit of persons substantially all of whom are nonresident aliens; or

(5) such plan is an excess benefit plan (as defined in section 1002(36) of this title) and is unfunded.

(15)

No. 91-1326

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

THE DISTRICT OF COLUMBIA and
SHARON PRATT KELLY, MAYOR,
Petitioners,

v.

THE GREATER WASHINGTON BOARD OF TRADE,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF *AMICUS CURIAE* OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF THE RESPONDENT

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QUESTION PRESENTED

Whether the Employee Retirement Income Security Act pre-empts the District of Columbia's Equity Amendment Act.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

No. 91-1326

THE DISTRICT OF COLUMBIA and
SHARON PRATT KELLY, MAYOR,
Petitioners,
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BRIEF *AMICUS CURIAE* OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF THE RESPONDENT

INTEREST OF THE *AMICUS CURIAE*

The Chamber of Commerce of the United States of America ("the Chamber") respectfully submits this brief *amicus curiae* in support of respondent, the Greater Washington Board of Trade.[1] The Chamber is the largest federation of business companies and associations in the world. With substantial membership in each of the 50 states, the Chamber represents approximately 200,000 businesses and organizations and serves as the principal

[1] Both petitioner and respondent have consented to the Chamber's filing of this brief. The parties' consent letters are being filed simultaneously with this brief.

voice of the American business community. An important function of the Chamber is to represent the interests of its members in important matters before this Court, the lower courts, the United States Congress, the Executive Branch and independent regulatory agencies of the federal government. Accordingly, the Chamber has sought to advance those interests by filing briefs in cases of importance to the business community addressed by this Court. *E.g., Ingersoll-Rand Co.* v. *McClendon*, —— U.S. ——, 111 S. Ct. 478 (1990), *FMC Corp.* v. *Holliday*, —— U.S. ——, 111 S. Ct. 403 (1990), and *Laborers Health & Welfare Trust Fund* v. *Advanced Lightweight Concrete Co.*, 484 U.S. 539 (1988).

The Chamber's members have a vital interest in preserving the uniform and exclusive federal regulation of pension plans intended by Congress when it passed the Employee Retirement Income Security Act of 1974, 29 U.S.C. Section 1001 *et seq.* ("ERISA"). The question presented in this matter—whether ERISA pre-empts the District of Columbia's Equity Amendment Act—is of great concern to Chamber members. The D.C. Act expressly cross-references workers' compensation benefits to the benefits provided under the employer's ERISA-covered plan. In doing so, the D.C. Act not only creates a threat of indirect state regulation of ERISA-covered plans, but also creates a substantial disincentive to the establishment and improvement of ERISA-covered plans. Thus, Chamber members have a fundamental interest in ensuring that the decision of the appellate court is affirmed, and the express pre-emption provisions of ERISA are preserved.

SUMMARY OF THE CASE

This case centers on the interplay between the District of Columbia Workers' Compensation Equity Amendment Act ("the D.C. Act") and the Employee Retirement Income Security Act of 1974 ("ERISA"). Section 514(a) of ERISA provides that "the provisions of [ERISA]

supersede any and all State laws insofar as they may now or hereafter *relate to* any *employee benefit plan* described in § 1003(a) of this title and not exempt under § 1003(b) of this title." 29 U.S.C. § 1144(a) (emphasis added). Section 1003(a) of ERISA sets out an expansive definition of an employee benefit plan "covered" by the statute. 29 U.S.C. 1003(a). Exempt plans are defined in § 1003(b) of the statute and include plans "maintained solely for the purpose of complying with applicable workmen's compensation laws . . ." 29 U.S.C. § 1003 (b)(3).

The Equity Amendment Act became effective on March 6, 1991 and amends the District of Columbia Workers' Compensation Act, D.C. Code § 36-301 *et seq.* to provide the following:

> (a-1)(1) Any employer who provides health insurance coverage for an employee shall provide health insurance coverage *equivalent to the existing health insurance coverage of the employee while the employee receives or is eligible to receive workers' compensation benefits under this act.*
>
> (3) The provision of health insurance coverage shall not exceed 52 weeks and shall be at the *same benefit level that the employee had at the time the employee received or was eligible to receive workers' compensation benefits* (emphasis added).

Respondent, the Greater Washington Board of Trade, challenged the Act in the U.S. District Court for the District of Columbia on the grounds it was pre-empted by § 514(a) of ERISA. The District Court rejected the Board of Trade's pre-emption argument. The court held that even though the Act "related to" an ERISA plan, the law escaped pre-emption because it fell within ERISA's § 1003(b)(3) exemption for state workers' compensation laws.

On appeal, the U.S. Court of Appeals for the D.C. Circuit reversed. According to the court, the Act "relates

to" two plans—an ERISA covered health plan, and an ERISA exempt workers' compensation plan. The court reasoned that since the Act *links* the benefits provided under these two plans, it is pre-empted. The court noted that had the Act related only to an ERISA exempt workers' compensation plan, the law would have escaped pre-emption. Here, however, the ERISA covered health plan was so closely tied to the workers' compensation payments as to demand pre-emption.

ARGUMENT

This brief focuses on the single issue pressed most forcefully by petitioner and their *amici*: whether the Equity Amendment Act "relates to" ERISA-covered plans sufficiently to trigger pre-emption under § 514 of ERISA. There is no dispute among the parties that the D.C. Act relates to workers' compensation plans, which are exempt from ERISA coverage. That relationship does not trigger pre-emption. The key question is whether, in addition to relating to exempt workers' compensation plans, the D.C. Act also relates to plans covered by ERISA.

If the Court finds that the D.C. Act relates to ERISA-covered plans, the final question is whether the D.C. Act is saved from pre-emption by the fact that it also relates to exempt plans.

I. THE D.C. ACT "RELATES TO" ERISA-COVERED PLANS.

This Court has established the criterion for "relating to" an ERISA-covered plan—whether the state law has "a connection with or reference to" an ERISA-covered plan. The Chamber believes that this criterion is satisfied by the fact that the D.C. Act expressly cross-references workers' compensation benefits to the benefits provided under the employer's ERISA-covered plan.

In an attempt to avoid this Court's prior holdings, petitioners and their *amici* argue that, while there is a relationship, it is too "tenuous, remote, or peripheral" to trigger ERISA pre-emption. On the contrary, the Chamber believes that the relationship goes to the heart of employee benefit plans and, if the D.C. Act were allowed to stand, states could easily regulate the content and administration of ERISA-covered plans in contravention of ERISA.

A. The D.C. Act "Relates To" ERISA-Covered Plans By Explicitly Basing Workers' Compensation Benefits On The Benefits Provided By the Employer's ERISA-Covered Plan.

The Equity Amendment Act must be pre-empted, and the decision below affirmed, because the Act conflicts with ERISA's unequivocal pre-emption provision—a provision included in the statute by Congress to provide for federal regulation of private employee benefit plans.[2] The heart of all ERISA pre-emption analysis lies in the language of the statute itself. This case turns on the relationship between ERISA's express pre-emption provision *and* the distinction between an ERISA "covered" plan and an ERISA "exempt" plan.

The structure of ERISA shows this logical order:

—First, section 3 of ERISA defines "employee welfare benefit plan" and "employee pension benefit plan," in

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[2] " 'The question of whether a certain state action is pre-empted by federal law is one of congressional intent. The purpose of Congress is the ultimate touchstone.' [Citations omitted]. 'To discern Congress' intent we examine the explicit statutory language and the structure and purpose of the statute.' " [Citations omitted]. *Gade, Director, Illinois Environmental Protection Agency v. National Solid Wastes Management Association*, No. 90-1676, slip. op., at 6 (U.S. June 18, 1992). This Court has repeatedly recognized that ERISA's broad express pre-emption provision was designed by Congress to ensure that federal laws govern employee benefit plans. *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41 (1987). The breadth of this pre-emption provision was most recently recognized by this Court in *Morales* v. *Trans World Airlines*, 60 U.S.L.W. 4444 (U.S. June 1, 1992).

both cases based on the type of benefits provided, and collectively refers to them as "employee benefit plans."

—Next, section 4(a) of ERISA provides that ERISA covers all "employee benefit plans" established or maintained by an employer engaged in commerce or any industry or activity affecting commerce (or by a union).

—Then, section 4(b) provides five enumerated exceptions to ERISA coverage, among which is the exception for plans maintained solely to comply with state workers' compensation laws.

—Finally, section 514(a) pre-empts any and all state laws insofar as they relate to employee benefit plans that are covered according to section 4(a) and not exempted by section 4(b). Thus, section 514(a) pre-empts any and all state laws insofar as they relate to ERISA-covered plans but does not pre-empt state laws insofar as they relate only to plans that are exempt from ERISA.

"A law 'relates to' an employee benefit plan, in the normal sense of the phrase, if it has a *connection with* or *reference to* such a plan." *Shaw* v. *Delta Air Lines, Inc.*, 463 U.S. 85, 96-97 (1983) (emphasis added). In *Shaw*, the Court recognized the broad sweep of the § 514(a) pre-emption clause, and struck down a New York state law forbidding discrimination in employee benefit plans on the basis of pregnancy. To support its finding, the Court relied on the legislative history of ERISA which evidenced Congressional intent for the federal regulation of employee benefit plans. H.R. Conf. Rep. No. 1280, 93d Cong., 2d Sess. 383 (1974); S. Conf. Rep. No. 1090, 93d Cong., 2d Sess. 383 (1974).

Although *Shaw* noted that "[s]ome state actions may affect employee benefit plans in too tenuous, remote, or peripheral a manner to warrant a finding that the law 'relates to' the plan," this Court has been unwilling to find the connection "tenuous" when the state law "refers"

to an ERISA plan. *Mackey* v. *Lanier*, 486 U.S. 825 (1988). In *Mackey*, the Court held pre-empted a portion of a Georgia garnishment statute on the grounds that the statute expressly referred to—or singled out—an ERISA plan. The Court noted that "[o]n several occasions since our decision in *Shaw*, we have reaffirmed this rule, concluding that state laws which make 'reference to' ERISA plans are laws that 'relate to' those plans within the meaning of § 514(a)." 486 U.S. 825, 829, quoting *Pilot Life Ins.* v. *Dedeaux*, 481 U.S. 41 (1987).

Furthermore, in *Ingersoll-Rand Co.* v. *McClendon*, —— U.S. ——, 111 S. Ct. 478, 483 (1990), this Court held that "a state law may 'relate to' a benefit plan, and thereby be preempted, even if the law is not specifically designed to affect such plans, or the *effect is only indirect*." (emphasis added). The Court ruled that a Texas state wrongful discharge action for interference with the attainment of pension benefits was pre-empted by ERISA because the action was premised on the existence of an ERISA plan. Thus, this Court recognized that state laws which are *premised on* or *make reference* to ERISA covered plans, "relate to" ERISA plans.

The D.C. Act does not have a "tenuous" relationship to an ERISA plan, but is in fact "premised on" the ERISA-covered health benefits plan an employer offers to its employees. The law falls squarely within the definition of "relates to" uniformly adhered to by this Court right up through *Ingersoll-Rand*. Under the D.C. scheme, employers who sponsor ERISA benefit plans for their active employees must provide equivalent benefits to employees eligible to receive workers' compensation.

In this respect, the D.C. law resembles a classic tying arrangement in antitrust. Just as a buyer is forced to buy article A (an otherwise undesirable product) if he wants to buy article B (the desirable product), the D.C. Act forces the employer to provide benefits in its workers' compensation plan if the employer wants to provide those benefits in its ERISA-covered plan. Just as a tying ar-

rangement relates to both of the tied articles, the law at issue in this case relates to both the covered and exempt plans.

B. The Relationship Of The D.C. Act To ERISA-Covered Plans Is Not Remote But Vitally Affects The Content And Administration of Such Plans.

Petitioners and their *amici*, faced with an obvious facial relation between the D.C. Act and ERISA-covered plans, retreat to arguing that the relationship is "tenuous, remote, or peripheral." They argue that the D.C. Act does not require the terms and conditions of the ERISA-covered plan to be altered, nor does it alter the administration and operation of ERISA-covered plans.

Of course, nothing in ERISA or this Court's previous decisions requires that a state law affect the terms and conditions or the operation and administration of ERISA-covered plans in order to trigger pre-emption. In the statute, Congress required nothing more than a finding that the state law "relate[s] to" an ERISA-covered plan. In its prior decisions, this Court has applied the words of the statute in accordance with their inherent breadth, holding all state laws pre-empted that had "a connection with or reference to" ERISA-covered plans, as just described. Indeed, as recently as 1990, this Court held pre-empted a state law that did not affect the terms and conditions or operation and administration of any ERISA-covered plan any more than the D.C. Act in this case does. *Ingersoll-Rand* v. *McClendon*, —— U.S. ——, 111 S. Ct. 478 (1990).

In *Ingersoll-Rand*, the Court faced the same entreaties as in this case to adopt a new judicially-created standard for ERISA pre-emption, *i.e.*, whether the state law affects the terms and conditions or administration and operation of ERISA-covered plans, but properly turned those entreaties aside. Besides the fact that it was explicitly rejected in *Ingersoll-Rand*, the poverty of this argument

by petitioners and their *amici* is eloquently revealed by the fact that *amicus* AFL-CIO cannot even make the argument without first spending 14 pages explaining that the "real" reason for every prior ERISA pre-emption decision of this Court was something different from what the opinion says. *Brief Of The American Federation of Labor And Congress Of Industrial Organizations As Amicus Curiae In Support of Petitioners* at 12-26.[3]

What the state law in *Ingersoll-Rand* and the D.C. Act have in common, besides relating on their face to ERISA-covered plans, is their substantial indirect effect on ERISA-covered plans. The Texas common law cause of

[3] Tellingly, the revisionist history of *amicus* AFL-CIO drives it to assert that *Ingersoll-Rand* was wrong and to re-argue a claim that this Court expressly rejected in *Ingersoll-Rand*, namely, the claim that section 514(c)(2) of ERISA shows that pre-emption applies only to a state law that "purports to regulate, directly or indirectly, the terms and conditions of employee benefit plans covered by this title." *Brief Of The American Federation Of Labor And Congress Of Industrial Organizations As Amicus Curiae In Support of Petitioners* at 24 n.16.

Not only did this Court expressly reject that argument, it did so on the solid ground set forth in the reply brief of *Ingersoll-Rand* (Reply Brief for the Petitioner in *Ingersoll-Rand* at 4-6), as follows: (i) "State" is defined in section 3(10) of ERISA, and Congress was content with pre-empting "State" laws insofar as they relate to employee benefit plans, but (ii) Congress also wanted to reach certain actions of state professional associations (such as bar associations) but realized that the "relate to" standard would be far too broad if the definition of "State" were merely expanded to such instrumentalities, so (iii) for the purpose of pre-emption only, in section 514(c)(2) Congress added instrumentalities to the ordinary definition of "State" but only those instrumentalities which purported to regulate the terms and conditions of plans.

Contrary to the assertion of *amicus* AFL-CIO, therefore, the last eighteen words of section 514(c)(2) serve a vital purpose. And, far from supporting petitioners, they only confirm Congress's understanding that the phrase "relate to" encompasses far more than regulation of the terms and conditions of plans. *Ingersoll-Rand* simply does not suffer from the illness for which *amicus* AFL-CIO prescribes radical reinterpretation as the cure.

action for wrongful discharge in *Ingersoll-Rand* would have created a powerful disincentive to the establishment and maintenance of ERISA-covered plans by subjecting employers to lawsuits, including extracontractual damages, solely because they maintained such plans.

The D.C. Act harbors an even more immediate disincentive to the establishment or improvement of ERISA-covered plans. Whereas an employer that does not offer an ERISA-covered plan need only provide the minimum level of health care directly mandated by the workers' compensation law, an employer that establishes an ERISA-covered plan will be required to upgrade its workers' compensation plan to achieve parity. If the additional cost of improving the workers' compensation plan is more than the employer can bear, then the D.C. law will have prevented the establishment of an ERISA-covered plan, in contravention of the express purpose of ERISA to foster the development of employee benefit plans, by imposing a cost that Congress chose not to impose in ERISA.

The same analysis applies to any improvement in an ERISA-covered plan. An employer that desires to offer a benefit in its ERISA-covered health plan—and under ERISA alone would be free to do so—cannot do so in the District of Columbia unless it also offers the same benefit in its workers' compensation plan. By tying the workers' compensation plan to the ERISA-covered plan, the D.C. Act imposes a substantial burden on the establishment and improvement of ERISA-covered plans.[4]

[4] Petitioners may argue that the tying arrangement is desirable in order to promote a high level of benefits in workers' compensation plans. But that is like the perpetrator of an illegal tying arrangement arguing that the arrangement is desirable for getting rid of the unpopular article. Whatever virtue there may be in promoting a high level of benefits in workers' compensation programs, Congress has declared that petitioners may not do so by correlatively burdening the establishment and improvement of ERISA-covered plans.

The substantial burden of the D.C. Act can be seen even more clearly by magnifying the law. If the D.C. Act, rather than requiring parity, required the workers' compensation plan to provide benefits twice as good—or three times as good—as the benefits under the ERISA-covered plan (like a tying arrangement forcing the buyer to buy article A at twice its market value if he wants to buy article B),[5] the chilling effect on establishment or improvement of ERISA-covered plans would be substantial and serious.

The D.C. Act is analytically no different from a workers' compensation tax measured by the level of benefits in the employer's ERISA-covered plan. After all, workers' compensation acts need not permit private insurance; they may operate as state-administered funds supported by taxes on employers.[6] If the District of Columbia had such a system, the economic reality would be clear that the state was taxing the employer on the content of its ERISA-covered plan.

As the lower courts have held, however, there is no doubt that a state tax based on the content of the employer's ERISA-covered plan is pre-empted. *E-Systems, Inc.* v. *Pogue*, 929 F.2d 1100 (5th Cir. 1991), *cert. denied*, —— U.S. ——, 112 S. Ct. 585 (1991). Such a state tax has an obvious "connection with or reference to" the ERISA-covered plan. More ominously, however, since the power to tax involves the power to destroy, such a state law would effectively allow the state to determine the content of ERISA-covered plans. Because this case is analytically identical to a tax, it is clear that the relation is not remote but immediate and substantial.

[5] For example, if the ERISA-covered plan had a deductible of $100, the D.C. Act could cap the deductible under the workers' compensation plan at half that amount. If the ERISA-covered plan had a lifetime maximum of $100,000, the D.C. Act could require the workers' compensation plan to provide double that amount.

[6] W.R. Dittmar, *State Workmen's Compensation Laws* (1950).

If the Court adopted the view of petitioners and their *amici* that a "mere" tying arrangement does not constitute a substantial enough relation to trigger ERISA pre-emption, an enormous loophole would be opened in ERISA pre-emption. For example, the state workers' compensation law could require that the administrator of the workers' compensation plan be the same person as the administrator of the ERISA-covered health plan. In the view of petitioners and their *amici*, such a workers' compensation law would not "relate to" the ERISA-covered plan. But if the existing administrator of the ERISA-covered plan did not offer the service of administering workers' compensation plans, such a law would effectively force the ERISA-covered plan to change administrators.

Or suppose that a state were unhappy with the fact that employers were self-insuring and thus depriving the state of the premium taxes that it used to collect when the ERISA-covered plans purchased insurance. *See E-Systems, Inc.* v. *Pogue*, 929 F.2d 1100 (5th Cir. 1991), *cert. denied*, —— U.S. ——, 112 S. Ct. 585 (1991). If a "mere" tying arrangement escaped ERISA pre-emption, what would prevent the state from enacting a workers' compensation law that required workers' compensation benefits at an extremely high level for those employers whose ERISA-covered plans were self-insured but at a much lower level for those whose plans were insured?

The tying arrangement in this case is qualitatively different from the analogy thrown up by *amicus* AFL-CIO regarding "make whole" remedies for wrongful discharge under state law.[7] For example:

[7] The AFL-CIO argues that the D.C. Act is no different from a "make whole" remedy for wrongful discharge under state law, since such a state-law remedy requires the employer to pay money measured by the benefits provided in the employer's ERISA-covered plan. Since state tort law is not pre-empted in that regard by ERISA, the AFL-CIO reasons, neither is the D.C. Act. *Brief Of The American Federation Of Labor And Congress Of Industrial Organizations As Amicus Curiae In Support Of Petitioners* at 29-30.

—A "make whole" remedy under state law need not make any mention of an ERISA-covered plan; it need only provide for the employee to be made whole for any and all losses. By contrast, the tying arrangement in this case, in order to work at all, must make particular, specific cross-reference to the employer's ERISA-covered plan.

—A "make whole" remedy is analytically the same as (and merely an economic substitute for) returning the employee to work and restoring his employment history as if the wrongful act had not occurred. If the employee were actually returned to work and his employment history restored, the consequences under the employer's ERISA-covered plans would flow automatically, without any reference to the plans. No one could seriously contend that returning the employee to work "relates to" the plans so as to trigger pre-emption, but that is all the "make whole" remedy amounts to.

—The "make whole" remedy represents no more than the economic value of the benefits to which the employee would have been entitled had the wrongful discharge not occurred. Expressed another way, it merely prevents the employer from realizing a windfall savings due to the wrongful act. By contrast, the tying arrangement in this case uses the ERISA-covered plan as a point of reference to provide the employee with a separate, additional benefit not provided by the ERISA-covered plan.

—Since the "make whole" remedy represents nothing more than a fulfillment of the promise that the employer has already made in its ERISA-covered plan, the remedy creates neither incentives nor disincentives with regard to establishment or improvement of the ERISA-covered plan. By contrast, the tying arrangement in this case, by creating an additional liability separate and apart from the ERISA-covered plan, creates substantial disincentives to the establishment and improvement of ERISA-covered plans.

In any event, there is no need to sift and weigh the actual or potential effect on ERISA-covered plans. Congress employed blanket pre-emption in § 514 in order to avoid any balancing tests—to avoid "endless litigation over the validity of State action that might impinge on Federal regulation" (120 Cong. Rec. 29942 (1974), *reprinted in* 3 *Legislative History of the Employee Retirement Income Security Act of 1974* (Comm. Print 1976) at 4770 (remarks of Sen Javits)).

II. WHERE A STATE LAW RELATES TO BOTH COVERED PLANS AND EXEMPT PLANS, IT IS STILL PRE-EMPTED INSOFAR AS IT RELATES TO COVERED PLANS.

We have conceded that the D.C. Act relates to workers' compensation plans, which are exempt from ERISA coverage. We have established that the D.C. Act also relates to health plans covered by ERISA. The final question is whether, and to what extent, a state law is pre-empted when it relates to both covered and exempt plans.

The language of ERISA provides the answer: ERISA § 514 pre-empts all state laws "insofar as they may now or hereafter relates to" any plan covered by ERISA. Thus, the state law is pre-empted insofar as it relates to covered plans but is free from pre-emption insofar as it relates only to plans that are exempt from ERISA coverage. In the present case, the D.C. Act must be pre-empted insofar as it ties workers' compensation benefits to the ERISA-covered plan; in all other respects it remains valid.

Petitioners urge a position that violates both the language and structure of ERISA. Petitioners argue that, because the law relates to exempt plans (which it does, in part), it is saved in its entirety from pre-emption (even including that part which relates to covered plans). The language of §514 precludes that argument in two ways:

1. Section 514 mandates pre-emption of laws that relate to covered plans. There is no exception for laws that also relate to exempt plans. If petitioners were right, it would be all too easy for a state to pass a law regulating ERISA-covered plans and then, to avoid pre-emption, to toss in a provision that regulates exempt plans, too.

2. Section 514 carefully mandates pre-emption only "insofar as" the law relates to covered plans demonstrating that pre-emption does not apply to the state law as a whole but only those parts which relate to covered plans.

The structure of ERISA also precludes petitioners' argument. Section 514 pre-empts all state laws insofar as they relate to covered plans. Section 4(b) provides that plans maintained solely to comply with state workers' compensation laws are not covered by ERISA. Thus, the workers' compensation exemption exempts *plans* from ERISA coverage; it does not exempt *state laws* from pre-emption.

Petitioners attempt to confuse the issue by referring to the situation where the employer uses its ERISA-covered plan to comply with state workers' compensation law. There is no reason for confusion. As this Court held in *Shaw*, state law may not regulate any portion of an ERISA-covered plan—even that portion which the employer maintains to comply with state workers' compensation law.* But nothing prevents a state from enacting a workers' compensation law that requires the workers' compensation program to be maintained as a separate plan, which would then be exempt from ERISA and beyond the reach of ERISA pre-emption.

While pre-emption is obvious where, as in *Shaw*, the employer folds the state-mandated benefits into its ERISA

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* ERISA section 4(b) exempts from ERISA coverage plans maintained solely to comply with state workers' compensation, unemployment insurance and disability insurance laws. A plan that provides benefits beyond those required by the state law is not maintained "solely" to comply with those laws and is therefore covered by ERISA. Thus, where an employer chooses to meet the minimum standards of a state workers' compensation law through its ERISA-covered plan, the entire plan is covered by ERISA.

covered plan, the analysis set forth in this brief does not depend on that configuration. On the contrary, our analysis has at all times assumed the harder case—that the workers' compensation plan is maintained separately from the ERISA-covered plan.

CONCLUSION

Even where the employer maintains its workers' compensation plan separate from its ERISA-covered plan, the D.C. Act is pre-empted because (1) on its face it relates to ERISA-covered plans by explicitly tying benefits under the workers' compensation plan to benefits under the ERISA-covered plan and (2) the relation is immediate and substantial, creating a strong disincentive to the establishment and improvement of ERISA-covered plans (contrary to the intent of Congress in ERISA) and posing a very real threat of indirect state regulation of ERISA-covered plans. Accordingly, the decision below should be affirmed.

Respectfully submitted,

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No. 91-1326

In the Supreme Court of the United States

OCTOBER TERM, 1992

THE DISTRICT OF COLUMBIA AND
SHARON PRATT KELLY, MAYOR, PETITIONERS

v.

THE GREATER WASHINGTON BOARD OF TRADE

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

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QUESTION PRESENTED

Whether Section 514(a) of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1144(a), preempts a District of Columbia statute requiring employers who sponsor health benefit plans to provide continuation coverage to employees who become eligible for workers' compensation.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Statutes and rule:

Statutes and rules—Continued: Page

Miscellaneous:

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INTEREST OF THE UNITED STATES

The Secretary of Labor is primarily responsible for enforcing and administering Title I of ERISA. ERISA Section 506(b), 29 U.S.C. 1136(b). Like the District of Columbia statute at issue in this case, Title I of ERISA governs continuation coverage under health benefit plans. ERISA Sections 601 through 608, 29 U.S.C. 1161-1168. ERISA's preemption provision, Section 514(a), 29 U.S.C. 1144(a), which Congress enacted to promote the development of employee benefit plans and to assure uniform regulation of such plans, plays a central role in facilitating the Secretary's enforcement and administration of Title I of ERISA by establishing federal supremacy in this

area. The Secretary therefore has a substantial interest in the resolution of the question presented.

STATUTORY PROVISIONS INVOLVED

The pertinent provisions of ERISA and the D.C. Code are reprinted in the appendix to this brief.

STATEMENT

1. The District of Columbia Workers' Compensation Equity Amendment Act of 1990 amended portions of the District's workers' compensation law, D.C. Code Ann. §§ 36-301 to 36-345 (1981 & Supp. 1991). The D.C. Act states that "any employer who provides health insurance coverage for an employee shall provide health insurance coverage equivalent to the existing health insurance coverage of the employee while the employee receives or is eligible to receive workers' compensation benefits under this chapter." D.C. Code Ann. § 36-307(a-1)(1) (Supp. 1991). Further, the D.C. Act requires coverage for 52 weeks "at the same benefit level that the employee had at the time the employee received or was eligible to receive workers' compensation benefits." D.C. Code Ann. § 36-307(a-1)(3) (Supp. 1991). The D.C. Act also provides that "an employer shall pay the total cost for the provision of health insurance coverage during the time that the employee receives or is eligible to receive workers' compensation benefits under this chapter, including any contribution that the employee would have made if the employee had not received or been eligible to receive workers' compensation benefits." D.C. Code Ann. § 36-307(a-1)(4) (Supp. 1991).

2. The Employee Retirement Income Security Act of 1974 (ERISA) provides that the federal statute

generally governs "any employee benefit plan," ERISA § 4(a), 29 U.S.C. 1003(a), including any plan "established or * * * maintained for the purpose of providing for its participants or their beneficiaries * * * medical, surgical, or hospital care or benefits," ERISA Section 3(1), 29 U.S.C. 1002(1). Congress amended ERISA in 1986 to provide that employers sponsoring health benefit plans must offer "continuation coverage under the plan." ERISA § 601(a), 29 U.S.C. 1161(a), added by Title X, Section 10002(a) of the Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA), Pub. L. No. 99-272, 100 Stat. 227. More specifically, ERISA provides that, following a "qualifying event" that otherwise "would result in the loss of coverage," ERISA § 603, 29 U.S.C. 1163, employers must provide for at least 18 months of continuation coverage, ERISA § 602(2), 29 U.S.C. 1162(2). However, ERISA does not obligate an employer to pay the cost of continuation coverage. Instead, a health benefit plan may require a participant to pay up to "102 percent of the applicable premium for such period." ERISA § 602(3)(A), 29 U.S.C. 1163(3)(A).

Section 514(a) of ERISA, 29 U.S.C. 1144(a), broadly preempts state laws that relate to employee benefit plans covered by ERISA.[1] Section 514(a) provides that ERISA "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section [4](a) of this title and not exempt under section [4](b) of this title." The exemption section referenced in ERISA's preemption provision states that a plan is exempt from ERISA altogether if it is "main-

[1] Under ERISA Section 3(10), 29 U.S.C. 1002(10), the term "State" includes the District of Columbia.

tained solely for the purpose of complying with applicable workmen's compensation laws or unemployment compensation or disability insurance laws." § 4(b)(3), 29 U.S.C. 1003(b)(3). The preemption provision, Section 514, also saves a variety of laws from preemption.[2] None of those express exceptions applies to the D.C. law at issue here.

3. Respondent Greater Washington Board of Trade, a non-profit corporation that provides health insurance coverage to its employees, filed suit to enjoin enforcement of the D.C. Act on the ground that the Act is preempted by ERISA. Petitioners District of Columbia and Mayor Sharon Pratt Kelly moved to dismiss. Pet. App. 6. The district court granted the motion to dismiss and denied the Board of Trade's application for a preliminary injunction. *Id.* at 21a-29a.

Relying on *Shaw* v. *Delta Air Lines, Inc.*, 463 U.S. 85, 96-97 (1983), the district court found that the D.C. Act "relate[s] to" an ERISA-covered employee benefit plan within the meaning of Section 514(a) because "benefits under the Act are set by reference to covered * * * plans." Pet. App. 22a. However, the court concluded that, under *Shaw*, a state law is not preempted if, first, it also relates to an employee

[2] ERISA's preemption provision states that it applies "[e]xcept as provided in subsection (b) of this section." Section 514(b), 29 U.S.C. 1144(b), saves from preemption state laws regulating insurance, banking, or securities; generally applicable state criminal laws; the Hawaii Prepaid Health Care Act in most respects; state laws regulating certain multiple employer welfare arrangements; qualified domestic relations orders; and certain state laws prohibiting exclusion from coverage of individuals who are provided, or eligible for, benefits or services pursuant to a plan under Title XIX of the Social Security Act.

benefit plan that is exempt from ERISA by virtue of Section 4(b)(3) and, second, an employer may provide the mandated benefits in a separately administered plan. Pet. App. 24a; see *Shaw*, 463 U.S. at 107-108. Because employers may provide the health benefits required by the D.C. Act through a separate plan covering only persons eligible for workers' compensation, the court held that the Act "falls squarely within this exemption." Pet. App. 24a. The district court thus reached the same result as the Second Circuit in *R.R. Donnelley & Sons Co.* v. *Prevost*, 915 F.2d 787 (1990), cert. denied, 111 S. Ct. 1415 (1991), with respect to the substantially identical provision of a Connecticut statute. Pet. App. 24a-25a.[3]

4. The court of appeals reversed. Pet. App. 1a-20a. It first observed that "[a] law relates to an employee benefit plan, 'in the normal sense of the phrase, if it has a connection with or reference to such a plan.'" *Id.* at 9a, quoting *Shaw*, 463 U.S. at 97; *Ingersoll-Rand Co.* v. *McClendon*, 111 S. Ct. 478, 483 (1990). "Under this broad common-sense meaning of the words," the court continued, "a state law may 'relate to' a benefit plan, and thereby be preempted, even if the law is not specifically designed to affect such plans, or the effect is only indirect." Pet. App. 9a, quoting *Ingersoll-Rand Co.* v. *McClendon*, 111 S. Ct. at 483. The court noted that the District of Columbia did "not dispute that the Equity Amend-

[3] The district court added that the Board of Trade had "suggest[ed] that the Act is preempted by the Consolidated Omnibus Budget Reconciliation Act," which added the provisions in Title I of ERISA requiring continuation coverage under group health plans. Pet. App. 29a. The court stated that "such a suggestion is not sufficient to warrant" preemption. *Ibid.*

ment Act 'relates to' an ERISA-covered employee benefit plan." Pet. App. 11a. That concession follows from the fact that "the Act 'relates to' an ERISA-covered plan by requiring that the new benefits be 'equivalent' to those already provided under an existing covered plan and by defining the employers who are obliged to provide the new benefits as those who already provide benefits under a covered plan." *Ibid.*

The court of appeals held that the district court erred by relying on the exemption for workers' compensation plans. By preempting "all laws relating to 'employee benefit plans described in section 4(a) and not exempt under section 4(b),'" the court explained, Section 514(a) "means that it is preempting all laws relating to employee benefit plans covered by ERISA." Pet. App. 13a. Thus, the fact that the D.C. Act relates to workers' compensation plans that are exempt from ERISA does not change the fact that it also relates to health benefit plans that are covered by ERISA, and hence is preempted. Similarly, the court of appeals added, "the Second Circuit focused on only half the story" in *R.R. Donnelley*. Pet. App. 15a. The Connecticut statute at issue in that case—on which "the District modelled the Equity Amendment Act," *id.* at 15a n.22—related to a plan covered by ERISA "by tying the new benefits to existing benefits and by limiting the law's applicability to employers already providing benefits through ERISA plans," *id.* at 15a.

Those factors also distinguished this case from *Shaw*, the court of appeals concluded. The New York disability law at issue in that case required employers to pay specified sick-leave benefits to pregnant employees. The D.C. Act would be comparable to the law at issue in *Shaw*, the court of appeals explained,

"had it, for example, made no reference to existing ERISA-covered plans and simply required all employers to provide specified minimum health benefits for employees receiving workers' compensation." Pet. App. 12a.

Furthermore, the court of appeals stated, "[n]ot only do the plain meaning and structure of ERISA itself require the conclusion that the Equity Amendment Act is preempted, but this result also furthers the broad purposes of ERISA preemption." Pet. App. 16a. In *Fort Halifax Packing Co.* v. *Coyne*, 482 U.S. 1, 11 (1987), this Court had recognized that a "patchwork scheme of regulation would introduce considerable inefficiencies in benefit program operation, which might lead those employers with existing plans to reduce benefits, and those without such plans to refrain from adopting them," and that Congress had preempted state laws relating to plans covered by ERISA for that reason. In this case, the court of appeals stated, the amount of the benefits required by the D.C. Act depends on the terms of health benefit plans covered by ERISA, so that "every time an employer considers changing the benefits under its ERISA-covered plan, it would have to consider the effect that such a change would have on its unique obligations to its District employees receiving workers' compensation." Pet. App. 17a. Thus, the court concluded, the D.C. Act "has inevitably affected the administration of an ERISA plan." Pet. App. 18a.

SUMMARY OF ARGUMENT

1. Section 514(a) of ERISA provides that the Act preempts state laws insofar as they "relate to" employee benefit plans covered by ERISA. This Court has construed "relates to" in a common-sense fashion, holding that a state law is preempted "if it has

a connection with or reference to such a plan." *Shaw* v. *Delta Air Lines, Inc.*, 463 U.S. 85, 96-97 (1983).

The D.C. Act both refers to and has a connection with plans covered by ERISA. The D.C. Act refers to health benefit plans sponsored by private employers (which are covered by ERISA) by stating that private employers must provide health benefits "equivalent to" those offered under their ERISA plans to employees eligible for workers' compensation. D.C. Code Ann. § 36-307(a-1)(1) (Supp. 1991). The D.C. Act also has a connection with ERISA plans, as the court of appeals explained, because the fact that employers are responsible for paying benefits equivalent to those provided under their ERISA plans will inevitably affect how employers structure their ERISA plans. See Pet. App. 17a.

The conclusion that the D.C. Act "relate[s] to" ERISA plans is further confirmed by the fact that both the D.C. Act and Sections 601 through 608 of ERISA (the provisions added in 1986 by COBRA) govern continuation coverage under health benefit plans. Because Sections 601 through 608 of ERISA plainly relate to ERISA plans, so does the D.C. Act. Moreover, the terms of the laws actually impose differing requirements. Under ERISA, plans may require employees to pay up to 102% of the cost of continuation coverage. Under the D.C. Act, a plan may not enforce such a provision.

2. The D.C. Act is not saved from preemption because it also relates to workers' compensation plans, which are exempt from ERISA's coverage under Section 4(b)(3). Under Section 514(a), state laws are preempted insofar as they relate to employee benefit plans covered by ERISA. Thus, the D.C. Act is preempted insofar as it relates to private health benefit

plans, whether or not it also relates to other sorts of plans that are exempt from ERISA's coverage.

This Court's decision in *Shaw* is not to the contrary. Unlike the D.C. Act, the New York disability law at issue in *Shaw* did not tie the mandated benefits to the terms of employee benefit plans covered by ERISA. Nor did the New York law overlap with ERISA by covering the same subject matter as the federal law. The New York law's only relationship to ERISA plans was that employers could provide the benefits mandated by the state law through a separate plan that was not subject to ERISA or through a multibenefit plan that would be subject to ERISA, a relationship that was not sufficient to trigger preemption.

3. Congress adopted ERISA's broad preemption provision to clear the field so that private employers sponsoring employee benefit plans, including health benefit plans, would not be subject to overlapping regulation. *Ingersoll-Rand Co.* v. *McClendon*, 111 S. Ct. 478, 484 (1990). It would conflict with Congress's purpose in adding a broad preemption provision to ERISA, as well as with the language of Section 514(a), to hold that a private employer sponsoring a health benefit plan is subject to conflicting requirements concerning continuation coverage under the plan.

ARGUMENT

THE D.C. ACT IS PREEMPTED INSOFAR AS IT REQUIRES EMPLOYERS SPONSORING HEALTH PLANS COVERED BY ERISA TO PROVIDE CONTINUATION COVERAGE TO EMPLOYEES ELIGIBLE FOR WORKERS' COMPENSATION BENEFITS

Two features of the D.C. Act compel the conclusion that it is preempted. First, the D.C. Act ties the benefits it mandates to the terms of ERISA plans by requiring private employers to provide health benefits equivalent to those provided under plans covered by ERISA. Second, the D.C. Act actually conflicts with ERISA because both laws govern continuation coverage under health benefit plans, but in different ways.

A. The D.C. Act "Relate[s] To" Health Plans That Are Subject To ERISA By Requiring Employers Sponsoring Such Plans To Provide Continuation Coverage At The Same Benefit Level To Employees Eligible For Workers' Compensation

1. Section 514(a) states that ERISA "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section [4](a) of this title and not exempt under section [4](b) of this title." As this Court has consistently held, ERISA's preemption provision "is conspicuous for its breadth." *FMC Corp.* v. *Holliday*, 111 S. Ct. 403, 407 (1990). Section 514(a) contains "deliberately expansive" language by which Congress "establish[ed] [employee benefit] plan regulation as exclusively a federal concern." *Pilot Life Ins. Co.* v. *Dedeaux*, 481 U.S. 41, 46 (1987), quoting *Alessi* v. *Raybestos-Manhattan, Inc.*, 451 U.S. 504, 523 (1981). This Court has identified the words "relate to" as the key to ERISA's preemption clause, and has

repeatedly reaffirmed their "broad common-sense meaning." *Ingersoll-Rand Co.* v. *McClendon*, 111 S. Ct. 478, 482-483 (1990), citing *Pilot Life*, 481 U.S. at 47; see *Morales* v. *Trans World Airlines, Inc.*, No. 90-1604 (June 1, 1992). Thus, under Section 514(a), "[a] law 'relates to' an employee benefit plan," and is therefore preempted, "if it has a connection with or reference to such a plan." *Shaw* v. *Delta Air Lines, Inc.*, 463 U.S. 85, 96-97 (1983).[4]

The "expansive sweep" of Section 514(a), *Pilot Life*, 481 U.S. at 47, extends beyond state laws "specifically designed to affect employee benefit plans." *Shaw*, 463 U.S. at 98. Congress rejected proposed language that would have preempted "only state laws dealing with the subject matters covered by ERISA—reporting, disclosure, fiduciary responsibility, and the like," in favor of the statute's broad language. *Ibid.*[5]

[4] Petitioners urge, Pet. Br. 26-27, 30, the Court to ascribe a far narrower meaning to the words "relate to." We submit, however, that it is no longer open to question whether Section 514(a) has as broad a sweep as its dictionary definition suggests. See *Morales*, slip op. 7. Moreover, petitioners' insistence on a cautious view of congressional intent, Pet. Br. 27, directly conflicts with Congress's inclusion in the statute of an express and broadly worded preemption provision. *Ingersoll-Rand*, 111 S. Ct. at 482; *Alessi*, 481 U.S. at 522.

[5] Prior to this Court's decision in *Ingersoll-Rand*, some appellate courts held that only those state laws that "purport to regulate" matters covered by ERISA are preempted. See, *e.g.*, *Hydrostorage, Inc.* v. *Northern Cal. Boilermakers Local Joint Apprenticeship Comm.*, 891 F.2d 719, 729-730 (9th Cir. 1989), cert. denied, 111 S. Ct. 72 (1990); *Rebaldo* v. *Cuomo*, 749 F.2d 133 (2d Cir. 1984), cert. denied, 472 U.S. 1008 (1985). They based that requirement on Section 514(c)(2), 29 U.S.C. 1144(c)(2) (emphasis added), which defines the term "State" to include "a State, any political subdivisions thereof, or any agency or instrumentality of either, which

Thus, Section 514(a) preempts state laws that overlap with ERISA. But Section 514(a) also preempts laws whose effect on covered plans "is only indirect" and laws "not specifically designed to affect such plans." *Ingersoll-Rand*, 111 S. Ct. at 483; *Metropolitan Life Ins. Co.* v. *Massachusetts*, 471 U.S. 724, 739 (1985), citing *Alessi*, 451 U.S. at 525; accord, *Pilot Life*, 481 U.S. at 47-48. Even those laws that are consistent with ERISA are preempted insofar as they relate to covered plans. *Ibid.*; see *Morales*, slip op. 6-8; *Mackey* v. *Lanier Collections Agency & Serv., Inc.*, 486 U.S. 825, 829-830 (1988).

There are, of course, limits to ERISA's preemptive reach: "Some state actions may affect employee benefit plans in too tenuous, remote, or peripheral a manner to warrant a finding that the law 'relates to' the plan." *Shaw*, 463 U.S. at 100 n.21; see Pet. App. 10a, 19a. However, this exception has been limited to laws of general application that do not refer to employee benefit plans covered by ERISA. See *Ingersoll-Rand*, 111 S. Ct. at 483 ("generally applicable statute that makes no reference to, or indeed functions irrespective of, the existence of an ERISA plan" may escape preemption); accord, *In re Dyke*, 943

purports to regulate, directly or indirectly, the terms and conditions of employee benefit plans covered by this subchapter." This Court construed the concluding clause of Section 514(c)(2) as broadening the definition of "State" rather than narrowing the scope of preemption in *Ingersoll-Rand*, 111 S. Ct. at 484, and refused to read a "purports to regulate" requirement into Section 514(a). 111 S. Ct. at 484. Contrary to amicus AFL-CIO, Br. 24-26 n.16, we fail to see how this Court's straightforward construction of Section 514(c)(2) renders it superfluous or is otherwise contrary to established principles of statutory construction.

F.2d 1435, 1448 (5th Cir. 1991).[6] By contrast, it is well established that a state law that both refers to employee benefit plans covered by ERISA and has a connection to such plans is preempted. *FMC Corp.*, 111 S. Ct. at 408 (ERISA preempts Pennsylvania's antisubrogation law, which has "a 'reference' to benefit plans governed by ERISA" and "a 'connection'" to them); see also *Mackey*, 486 U.S. at 838 n.12 (law that "singles out ERISA plans, by express reference, for special treatment is pre-empted"); *Ingersoll-Rand*, 111 S. Ct. at 483 (ERISA preempts state law cause of action for wrongful discharge that "makes specific reference to, and indeed is premised on, the existence of a pension plan"). Such a result is necessary to achieve Congress's purpose of eliminating "a patchwork scheme of [state] regulation." *Fort Halifax Packing Co.* v. *Coyne*, 482 U.S. 1, 11 (1987).

2. Application of these principles leads to the conclusion that the D.C. Act "relate[s] to" plans covered by ERISA. Petitioners conceded that point in the court of appeals. See Pet. App. 11a.

a. The D.C. Act plainly references employee benefit plans covered by ERISA by mandating "health

[6] See also *Aetna Life Ins. Co.* v. *Borges*, 869 F.2d 142 (2d Cir.) (state escheat law applied to uncollected ERISA benefit checks issued by insurance company under policy guaranteeing benefits), cert. denied, 493 U.S. 811 (1989); *Firestone Tire & Rubber Co.* v. *Neusser*, 810 F.2d 550 (6th Cir. 1987) (income tax of general application applied to employee income under ERISA plans); *Sommers Drug Stores Co. Employee Profit Sharing Trust* v. *Corrigan Enters., Inc.*, 793 F.2d 1456 (5th Cir. 1986) (law imposing fiduciary duties on corporate officers for the benefit of shareholders), cert. denied, 479 U.S. 1034, 1089 (1987); *Lane* v. *Goren*, 743 F.2d 1337 (9th Cir. 1984) (state fair employment law applied to ERISA plans in their capacity as employers).

insurance coverage equivalent to the existing health insurance coverage of the employee." D.C. Code Ann. § 36-307(a-1)(1) (Supp. 1991). Thus, the D.C. Act applies only to employers providing health benefits and ties the level of benefits due under the D.C. Act to the level of benefits provided under the employer's health benefit plan.[7]

Moreover, contrary to petitioners' central claim in this Court, see Br. 12, 25-26, 31-32, the D.C. Act does not "merely * * * refer[] to benefits" under plans covered by ERISA. *Id.* at 26; see also AFL-CIO Amicus Br. 14-15. To the contrary, as the court of appeals determined, the D.C. Act has a clear connection with ERISA-covered plans, since any change in a covered plan necessarily affects an employer's "unique obligations to its District employees receiving workers' compensation" and therefore "inevitably affect[s] the administration of an ERISA plan." Pet. App. 17a-18a. Thus, the D.C. Act's indirect impact on covered plans demonstrates that the D.C. Act does not "function[] irrespective of" them. *Ingersoll-Rand*, 111 S. Ct. at 483; see *Metropolitan Life*, 471

[7] The D.C. Act applies to all employers, including some employers (*e.g.*, churches and governments) whose health plans are exempt from ERISA's coverage. See Pet. Br. 3 n.1, 23, 33; cf. 29 U.S.C. 1003(b)(1) and (2) (excluding government and church plans from coverage under ERISA). But the fact that the D.C. Act applies to a broader class of employers than does ERISA does not detract from the special treatment accorded under the D.C. Act to ERISA plans and their sponsors vis a vis other private employers that do not provide health benefits. In our view, the D.C. Act is preempted insofar as it relates to ERISA plans, but not insofar as it applies to church and government plans. That, of course, is true of all laws preempted by Section 514(a)—they are preempted only "insofar as they * * * relate to any employee benefit plan" covered by ERISA.

U.S. at 740; *Alessi*, 451 U.S. at 525; accord, *Pilot Life*, 481 U.S. at 47-48.

b. The conclusion that the D.C. Act "relate[s] to" employee benefit plans covered by ERISA is further confirmed by the fact that the D.C. Act covers the same subject matter as Sections 601 through 608 of ERISA, the provisions added by COBRA in 1986. Both the D.C. Act and ERISA now require employers to offer to provide continuation coverage under health benefit plans when an employee becomes eligible for workers' compensation. The laws adopt differing requirements, however. The provisions added to ERISA by COBRA require employers to offer continuation coverage in a broader range of cases (not just when an employee becomes eligible for workers' compensation), but Congress, unlike the District of Columbia Council, expressly permitted plans to require employees to pay the premium for continued coverage. The District has removed that option, expressly preserved by Congress, and required employers to assume the cost of health coverage. The D.C. Act accordingly seeks to make unenforceable a right conferred on plans by Congress.

A conclusion that the D.C. Act does not "relate to" ERISA plans, even though it requires employers to continue to provide health benefits to employees eligible for workers' compensation, would logically compel the conclusion that Sections 601 through 608 of ERISA do not "relate to" ERISA plans either. But by requiring employers to provide continuation coverage, Sections 601 through 608 of ERISA plainly "relate to" ERISA plans. So does the D.C. Act.

c. The fact that the D.C. Act overlaps with Sections 601 through 608 of ERISA and may affect how employers structure their ERISA plans distinguishes this case from those cases relied upon by amicus

American Association of Retired Persons, Br. 11-12, holding that ERISA does not preempt a damages remedy that takes into account the value of fringe benefits. See *Martori Bros. Distrib.* v. *James-Massengale*, 781 F.2d 1349, modified, 791 F.2d 799 (9th Cir.) (make-whole remedy for employer's bad faith bargaining, which takes into account the value of all employee benefits, is not preempted), cert. denied, 479 U.S. 949 (1986); *Jaskilka* v. *Carpenter Technology Corp.*, 757 F. Supp. 175, 178 (D. Conn. 1991) (cause of action for wrongful discharge and breach of contract, seeking damages that include the value of ERISA benefits, is not preempted); *Teper* v. *Park West Galleries, Inc.*, 427 N.W.2d 535, 541 (Mich. 1988) (claim for wrongful discharge seeking damages, including future pension benefits, is too "peripheral" to warrant preemption).

First, no provision in ERISA governs the calculation of benefits in cases arising under other statutes. Thus, unlike this case, there is no overlap between ERISA and the state laws at issue in cases like *Martori Bros.* Second, an employer is unlikely to alter the terms of its ERISA plan because, for example, an employee injured in a traffic accident will be able to recover the value of lost benefits as well as lost wages. The connection in such a case is not of the same order of magnitude as when an employer is required by state law to continue to provide benefits for a specified period of time at the level established by an ERISA plan.

d. Having receded from their prior concession that the D.C. Act relates to employee benefit plans covered by ERISA, petitioners now propose a new three-part test to determine whether a "state law should be said to 'relate to' ERISA-covered plans." Br. 26. Under the proposed test, a state law is preempted only if it

deals with the same subject matter as ERISA, affects the content or administration of ERISA plans, or conflicts with specific provisions of ERISA. *Ibid.* Whatever may be said in support of petitioners' test —and it appears flawed since it does not preempt laws that refer to ERISA plans, see *Mackey*, 486 U.S. at 830—the D.C. Act is not saved from preemption under the test. The D.C. Act and ERISA both pertain to continuation coverage under health benefit plans, and the D.C. Act affects the content and administration of ERISA plans by tying the benefits payable under the D.C. Act to the terms of such plans.[8]

B. The D.C. Act Is Not Saved From Preemption Because It "Relate[s] To" Workers' Compensation Plans, Which Are Exempt From ERISA, As Well As To Health Benefit Plans Subject To ERISA

1. As the court of appeals explained, Section 4(b)(3) of ERISA—the provision exempting plans "maintained solely for the purpose of complying with applicable workmen's compensation laws" from coverage under ERISA—does not save the D.C. Act from preemption. The D.C. Act does not purport to reach plans that are maintained solely to provide workers' compensation benefits. Instead, it applies solely to plans that were established for other purposes, since it only obligates employers to continue health coverage, and not to provide it otherwise.

The plain language of the statute accordingly precludes that application of the D.C. Act to ERISA

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[8] The third part of petitioner's test serves no purpose. A state law that conflicts with a federal law is preempted even in the absence of an express preemption provision. By preempting laws insofar as they "relate to" ERISA plans, Congress mandated preemption in the absence of any actual conflict.

plans. Section 514(a) preempts state laws insofar as they "relate to any employee benefit plan described in section [4](a) and not exempt under section [4](b)." Private health benefit plans are "employee welfare benefit plans" under Section 3(1) of ERISA, and no provision of Section 4(b) exempts such plans from coverage under ERISA. Thus, the D.C. Act is preempted insofar as it relates to health benefit plans sponsored by private employers.[9]

The conclusion that the D.C. Act is preempted is not affected by the fact that the D.C. Act also relates to workers' compensation plans, which are exempt from ERISA under Section 4(b)(3). As the AFL-CIO explains in its amicus brief at 9-10, "[t]he syntax of § 514(a) * * * makes lucid that state laws *are* preempted insofar as the laws 'relate to' ERISA employee benefit plans *not* exempt from ERISA coverage under § 4(b), whether or not the state law also relate[s] to exempt plans." Or as the court of appeals explained, the phrase "all laws relating to 'employee benefit plans described in section 4(a) and not exempt under section 4(b)'" in Section 514(a) "means that it * * * preempt[s] all laws relating to employee benefit plans covered by ERISA." Pet. App. 13a.

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[9] In arguing that the D.C. Act is saved from preemption because it is a law relating to workers' compensation, Br. 11, 20, petitioners confuse the exemptions from ERISA's coverage listed in Section 4(b) with the exceptions to preemption listed in Section 514(b). Section 4(b) exempts certain *plans* (such as those maintained solely to provide workers' compensation benefits) from ERISA's coverage. Section 514(b) excepts certain *laws* (such as those regulating insurance) from preemption. Neither provision excepts laws relating to workers' compensation from preemption, however. Such laws are preempted insofar as they relate to plans covered by ERISA.

There is no doubt that Section 4(b)(3) embodies Congress's intent to leave intact traditional state regulation of matters concerning disability benefits, workers' compensation, and unemployment, and to provide a mechanism—the option of establishing a separately administered plan—to achieve that goal. *Shaw*, 463 U.S. at 107-108. And petitioners are correct. Pet. Br. 22, in stating that Congress thereby expressed its tolerance for resulting inconsistencies in state laws of this type. At the same time, however, Congress intended Section 514(a) to eliminate as far as possible any inconsistencies relating to those areas of exclusive federal concern set forth in ERISA. *Shaw*, 463 U.S. at 99. The D.C. Act does not solely regulate workers' compensation, but intrudes upon the administration and content of ERISA-covered benefit plans.[10] Thus, the D.C. Act is preempted insofar as it relates to health benefit plans covered by ERISA, and is not saved from preemption because it also relates to exempt workers' compensation plans.

2. This Court's decision in *Shaw* is not to the contrary. The New York disability law at issue in *Shaw* required employers "to pay certain benefits to

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[10] The fact that Section 4(b)(3) defines an exempt plan as one "maintained *solely* for the purpose of complying with applicable workmen's compensation laws" (emphasis added) is significant. It evidences Congress's intent that plans that are maintained for both exempt (*i.e.*, workers' compensation) and non-exempt (*e.g.*, health benefit) purposes are covered by ERISA. See *Shaw*, 463 U.S. at 107 ("§ 4(b)(3)'s use of the word 'solely' demonstrates that the purpose of the entire plan must be to comply with an applicable disability insurance law"); accord, *Alessi*, 451 U.S. at 523 n.20. It follows that a state law that has a workers' compensation purpose, but also relates to an ERISA-covered plan maintained for another purpose, is subject to the normal operation of Section 514(a). See *Alessi*, 451 U.S. at 525.

employees unable to work because of nonoccupational injuries or illness," including pregnancy. 463 U.S. at 89. Unlike the D.C. Act, the benefits were not conditioned on participation in a plan covered by ERISA or measured by the benefits available under an ERISA plan, but instead were the lesser of $95 per week or one-half the employee's average weekly wage, for a 26-week period. *Ibid.* Nor does ERISA require the payment of benefits to persons unable to work because of nonoccupational injuries and illnesses, such as pregnancy. Thus, the only relationship between the New York law and ERISA plans was that the benefits required by the New York law could be paid, at the employer's option, through a multibenefit plan covered by ERISA. Thus, as the court of appeals explained, the D.C. Act would be comparable to the New York disability law at issue in *Shaw* if the D.C. Act, "for example, made no reference to existing ERISA-covered plans and simply required all employers to provide specified minimum health benefits for employees receiving workers' compensation." Pet. App. 12a. Whether such a statute would be preempted would then depend entirely on the question of whether there was a conflict between the statute and the continuation coverage provisions added to ERISA by COBRA.

Amicus AFL-CIO points out that the disability law at issue in *Shaw* related to employee benefit plans covered by ERISA in that employers were permitted to fulfill their obligations under the disability law through a separate plan which would be exempt from ERISA or through a multibenefit plan subject to ERISA. Br. 16. But that merely shows that an option to provide state-mandated benefits through an ERISA plan does not, by itself, establish a sufficient relationship to an ERISA plan to warrant preemption. We do not contend that the D.C. Act "relate[s] to" ERISA plans merely because D.C. employers may provide the mandated benefits through plans covered by ERISA. Rather, the D.C. Act necessarily relates to ERISA plans because: (1) the D.C. Act specifically refers to employee benefit plans covered by ERISA; (2) the D.C. Act has a connection with ERISA plans, because the D.C. Act applies to a private employer only if it sponsors an ERISA plan and, if so, the amount of the benefits payable depends on the amount payable under the ERISA plan; and (3) ERISA explicitly provides for continuation coverage under health plans, the same subject covered by the D.C. Act.[11]

C. Congress Did Not Intend To Subject Employers Sponsoring Health Benefit Plans To Overlapping Requirements

The District of Columbia has regulated benefit plans in a manner that will serve as a disincentive for employers to establish health benefit plans and will impair uniform administration across state lines. Section 514 was included in ERISA to prevent precisely such effects. As the court of appeals explained, "[b]y requiring employers to take into account the effects that any general decisions about ERISA bene-

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[11] Petitioners contend that all workers' compensation laws relate to ERISA plans because Section 3(1) of ERISA defines "employee welfare benefit plan" to include "benefits in the event of sickness, accident, disability * * * or unemployment." Br. 16. But that is not so. A plan providing such benefits that is maintained solely to comply with a workers' compensation law is not subject to ERISA under Section 4(b)(3). Thus, a law that relates only to exempt plans—such as a law that does not tie the amount of benefits under such a plan to the benefits payable under a plan that is subject to ERISA—does not relate to any ERISA plan.

fits would have on their responsibilities to their injured employees in the District of Columbia, the District has inevitably affected the administration of an ERISA plan." Pet. App. 18a.[12] Since any increase in benefits under a health benefit plan leads directly to an increase in benefits payable to employees who become eligible for workers' compensation in the District, the D.C. Act could lead "employers with existing plans to reduce benefits, and those without such plans to refrain from adopting them." *Fort Halifax Packing Co.*, 482 U.S. at 11. But ERISA's "crowning achievement" was reserving for "Federal authority the sole power to regulate the field of employee benefit plans." 120 Cong. Rec. 29,197 (1974) (statement of Rep. Dent).

Moreover, ERISA permits employers nationwide to adopt plans that require employees to assume the cost of continuation coverage under health care plans. ERISA Section 602(3)(A), 29 U.S.C. 1162(3)(A). But the law at issue has made such terms unenforceable, since it provides that "an employer shall pay the total cost for the provision of health insurance coverage" while an employee is eligible for workers' compensation. D.C. Code Ann. § 36-307(a-1)(4) (Supp. 1991). Further, under the D.C. Act an employer must provide coverage "at the same * * * level that the employee had at the time the employee received or was eligible to receive workers' compensation benefits." D.C. Code Ann. § 36-307(a-1)(3) (Supp. 1991). The provisions added to ERISA by COBRA, on the other hand, provide that "[i]f cover-

[12] Amicus American Association of Retired Persons, which supports petitioners, characterizes the D.C. Act as "a substantial * * * departure from existing law." Br. 7. Only Connecticut is reported to have a similar statute.

age is modified under the plan for any group of similarly situated beneficiaries, such coverage *shall* also be modified in the same manner for all individuals" receiving continuation coverage. ERISA § 602(1), 29 U.S.C. 1162(1) (emphasis added). An employer who modifies a plan to reduce benefits would accordingly confront directly conflicting requirements under the two laws. Under ERISA an employer with 20 or more employees[13] must offer continued coverage under the plan as amended. Under the D.C. Act, an employer cannot lower benefit levels pursuant to such amendments.

An example readily illustrates the conflict. Assume that a D.C. employer with 20 or more employees eliminated coverage for drug treatment, while increasing coverage for dental work. An employee who had recently become eligible for workers' compensation and otherwise would have lost coverage under the employer's health benefit plan would be entitled under ERISA to (a) continued health coverage for 18 months; (b) no coverage for drug treatment; (c) increased coverage for dental work; and (d) the employee could be required to pay the applicable premium if dictated by the terms of the plan. In contrast, under the D.C. Act, the employee would be entitled to (a) coverage for 52 weeks; (b) drug treatment, but (c) no increase in dental benefits; and (d) the employee has no obligation to contribute to the cost of the plan. An employer operating in more

[13] Section 601(b) of ERISA, 29 U.S.C. 1161(b), exempts from the continuation coverage requirements any group health plan if "all employers maintaining such plan normally employed fewer than 20 employees on a typical business day during the preceding calendar year." The D.C. Act has no comparable exemption.

than one jurisdiction could, of course, be required to comply with other state continuation coverage laws identical neither to ERISA nor to the D.C. Act if the D.C. Act is not preempted. And an employer apparently would be subject to suits alleging deficiencies in the continuation coverage provided under its health benefit plan both under Section 502(a) of ERISA, 29 U.S.C. 1132(a), which provides "the exclusive remedy" for violations of the terms of employee benefit plans, *Ingersoll-Rand*, 111 S. Ct. at 484-486, and under state statutes providing remedies for violations of applicable state continuation coverage laws.

This example clearly illustrates that the D.C. Act cannot be sustained under Section 514(a). That provision "was intended to ensure that plans and plan sponsors would be subject to a uniform body of benefit law; the goal was to minimize the administrative and financial burden of complying with conflicting directives among States or between States and the Federal Government." *Ingersoll-Rand*, 111 S. Ct. at 484. It would be contrary to Congress's purpose in enacting Section 514(a) to require employers to comply both with ERISA's continuation coverage requirements and with continuation coverage requirements adopted by the States.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

Section 3(1) of ERISA, 29 U.S.C. 1002(1), provides:

The terms "employee welfare benefit plan" and "welfare plan" mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, or (B) any benefit described in section 186(c) of this title (other than pensions on retirement or death, and insurance to provide such pensions).

Section 4 of ERISA, 29 U.S.C. 1003, provides in pertinent part:

(a) Except as provided in subsection (b) of this section and in sections 1051, 1081, 1101 of this title, this subchapter shall apply to any employee benefit plan if it is established or maintained—

(1) by any employer engaged in commerce or in any industry or activity affecting commerce; or

(2) by any employee organization or organizations representing employees engaged in commerce or in any industry or activity affecting commerce; or

(3) by both.

(b) The provisions of this subchapter shall not apply to any employee benefit plan if—

* * * * *

(3) such plan is maintained solely for the purpose of complying with applicable workmen's compensation laws or unemployment compensation or disability insurance laws;

* * * * *

Section 514(a) of ERISA, 29 U.S.C. 1144(a), provides in pertinent part:

Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title.

Section 601 of ERISA, 29 U.S.C. 1161, provides:

(a) In General

The plan sponsor of each group health plan shall provide, in accordance with this part, that each qualified beneficiary who would lose coverage under the plan as a result of a qualifying event is entitled, under the plan, to elect, within the election period, continuation coverage under the plan.

(b) Exception for certain plans

Subsection (a) of this section shall not apply to any group health plan for any calendar year if all employers maintaining such plan normally employed fewer than 20 employees on a typical business day during the preceding calendar year.

Section 602 of ERISA, 29 U.S.C. 1162, provides in pertinent part:

For purposes of section 1161 of this title, the term "continuation coverage" means coverage under the plan which meets the following requirements:

(1) Type of benefit coverage

The coverage must consist of coverage which, as of the time the coverage is being provided, is identical to the coverage provided under the plan to similarly situated beneficiaries under the plan with respect to whom a qualifying event has not occurred. If coverage is modified under the plan for any group of similarly situated beneficiaries, such coverage shall also be modified in the same manner for all individuals who are qualified beneficiaries under the plan pursuant to this part in connection with such group.

(2) Period of coverage

The coverage must extend for at least the period beginning on the date of the qualifying event and ending not earlier than the earliest of the following:

(A) Maximum required period

(i) General rule for termination and reduced hours

In the case of a qualifying event described in section 1163(2) of this title, except as provided in clause (ii), the date which is 18 months after the date of the qualifying event.

* * * * *

(3) **Premium requirements**

The plan may require payment of a premium for any period of continuation coverage, except that such premium—

(A) shall not exceed 102 percent of the applicable premium for such period, and

(B) may, at the election of the payor, be made in monthly installments.

* * * * *

Section 603 of ERISA, 29 U.S.C. 1163, provides in pertinent part:

For purposes of this part, the term "qualifying event" means, with respect to any covered employee, any of the following events which, but for the continuation coverage required under this part, would result in the loss of coverage of a qualified beneficiary:

(1) The death of the covered employee.

(2) The termination (other than by reason of such employee's gross misconduct), or reduction of hours, of the covered employee's employment.

(3) The divorce or legal separation of the covered employee from the employee's spouse.

(4) The covered employee becoming entitled to benefits under title XVIII of the Social Security Act [42 U.S.C. 1395 et seq.]

(5) A dependent child ceasing to be a dependent child under the generally applicable requirements of the plan.

(6) A proceeding in a case under Title 11, commencing on or after July 1, 1986, with respect to the employer from whose employment the covered employee retired at any time.

* * * * *

D.C. Code Ann. § 36-307 (Supp. 1991) provides in pertinent part:

(a-1)(1) Any employer who provides health insurance coverage for an employee shall provide health insurance coverage equivalent to the existing health insurance coverage of the employee while the employee receives or is eligible to receive workers' compensation benefits under this chaper.

(2) For purposes of this subsection, the phrase "eligible to receive" means:

(A) An employee is away from work due to a job-related injury for which the employee has filed a claim for workers' compensation benefits under this chapter; or

(B) An employer has knowledge of a job-related injury of an employee who is away from work due to the job-related injury pursuant to which workers' compensation benefits may become due under § 36-315.

(3) The provision of health insurance coverage shall not exceed 52 weeks and shall be at the same benefit level that the employee had at the time the employee received or was eligible to receive workers' compensation benefits.

(4) Except as provided in paragraph (3) of this subsection, an employer shall pay the total cost for the provision of health insurance coverage during the time that the employee receives or is eligible to receive workers' compensation benefits under this chapter, including any contribution that the employee would have made if the employee had not received or been eligible to receive workers' compensation benefits.

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